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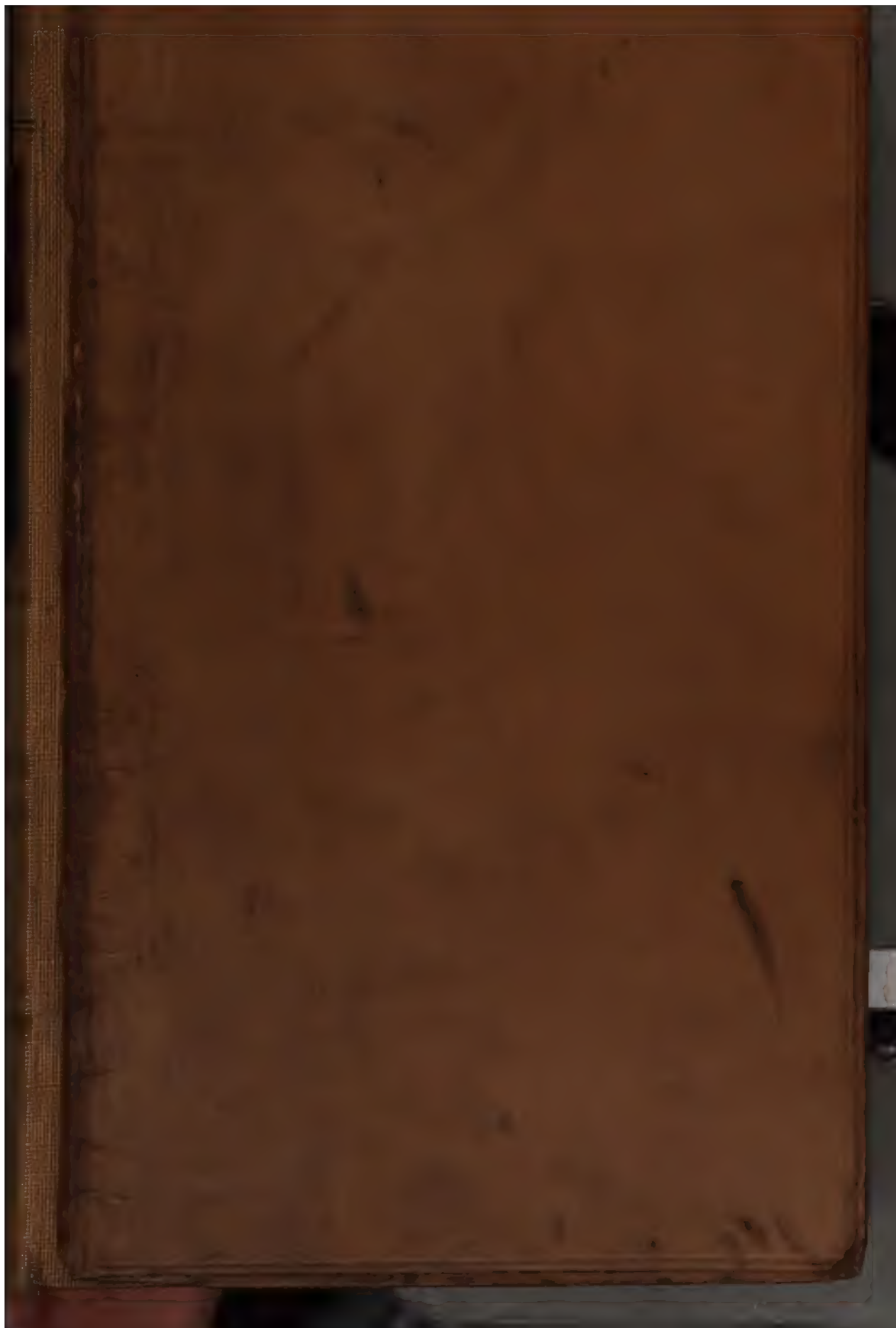
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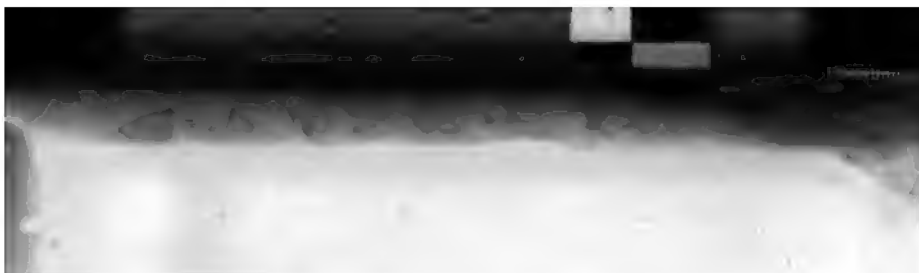
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NEW
REPORTS
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1834.

BY RICHARD BLIGH, Esq.
BARRISTER AT LAW.

VOL. VII.

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ERRATUM.

Page 395.—For “to decide,”—read “to be decided.”

CORRIGENDA.

- Page 229. line 5. *for* Cruise Dig. 445. *read* 441.
 same line, see 1 Sanders' Uses.
 line 7. *for* 618. *read* 686.
290. line 6. from bottom, *for* 2 & 9. *read* 289.
293. line 5. *for* H. 13. C. *read* New Rep.
296. line 10. *for* rule (p. 129.) *read* 432.
297. line 14. from bottom, *for* 117. *read* 517.
241. *for* Exchequer Chamber *read* King's Bench.
278. line 11. from bottom, *for* Dyer, 288. *read* 283.
 line 6. from bottom, *for* Q. *read* K. R.
281. line 15. from bottom, *for* 450. *read* 65.
282. line 5. *for* 122. *read* 121.
283. line 1. *for* 646. *read* 65.
285. line 14. from bottom, *for* 153. *read* 113.
300. line 1. *for* 24 Hen. *read* 28 Hen.
307. line 9. *for* 793. *read* 758.

REPORTS OF CASES
HEARD IN THE
HOUSE OF LORDS,
UPON APPEALS AND WRITS OF ERROR,
And decided during the Session 1833,
3d & 4th W. IV.

ENGLAND.

(COURT OF CHANCERY.)

SARAH LOGAN, JOHN DANIEL
BIRKETT, and CHARLES JAMES } *Appellants;*
NELSON BIRKETT - - - }

MARY WIENHOLT and JOHN } *Respondents.*
BIRKETT WIENHOLT - - - }

D., upon the marriage of S., his niece, executed a bond, with a penalty, to N. and G. The condition of the bond recited the intended marriage, and that, in consideration thereof, and of natural love and affection to his niece, he had agreed to make some provision for her and the issue of the marriage; and that, "in case S., or any issue of the marriage, " should survive D., or he should die unmarried, that he, " his heirs, &c. should pay to N. and G., their executors, " &c. 2000*l.* &c. But if D. should die leaving a wife or " issue living, &c., then the sum of 1000*l.* &c., upon trust to " lay out the 2000*l.* or 1000*l.* &c. in public or government " securities, upon trust for the separate use of S. for life, and " at her decease, for the issue of the marriage living, &c. " &c.; and also, if S., or any issue of the marriage, should be " living at the death of D., he being unmarried and without

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“ issue, that, exclusive of the before-mentioned provision,
 “ he should, either by his last will and testament give and
 “ bequeath, or, by some ways or means give or leave unto,
 “ or in trust for S. or the issue of the marriage, so much in
 “ money or valuable effects as he should by such will give
 “ or bequeath to any one of his next of kin or nearest rela-
 “ tions, or any other person, or persons; or, if he should
 “ make no such bequest, &c., or if such bequest should fall
 “ short of the greatest bequest in such will to any one of his
 “ next of kin, &c.; then, if the executors, &c. of D. should
 “ pay to N. and G. &c., or make good any deficiency that
 “ the same should fall short of, &c., in trust for S. and the
 “ issue, &c. in manner as before mentioned respecting the
 “ 2000*l.* or 1000*l.* &c.; then the obligation to be void,
 “ otherwise to remain in force.”

The marriage took effect, and there were issue who attained twenty-one. S. and her husband died in the lifetime of D., who, after the date of the bond, had a natural daughter, S. B., who intermarried with D. B., the nephew of D. S. died in 1800. In April, 1804, D. employed solicitors to state cases, and took opinions as to the mode in which he might dispose of his property, so as not to be affected by the provisions of the bond.

In May, 1804, D. conveyed freehold lands, &c., at H. &c., in trust for himself for life; remainder in trust for S. B. for her separate use; remainder to D. B. for life; remainder to such uses as the survivor shall appoint; remainder, in default of appointment, to his own right heirs. By another indenture of the same date, D. conveyed estates at C. &c. in trust for himself for life, with contingent remainders successively to two of the sons of D. B.; remainder to D. B. in fee. In 1814, he executed two other conveyances, in both of which, reserving estates to himself for life, he limited remainders in the lands conveyed in trust for the sons, with the ultimate remainders in fee to D. B. All these lands were purchased by D. after the date of the bond by application and proportionate diminution of his personal estate, and the conveyances were made without consideration.

In 1811, D. assigned to D. B. a bond for 16,000*l.* The assignment was made without consideration, and D. continued to receive the interest for life under the security of a bond from D. B. In 1817, he assigned a mortgage for 2000*l.* in trust for himself for life, and at his death for the benefit of S. B. In February, 1817, he transferred 20,000*l.* navy five per cents. and 35,000*l.* three per cent. consols to D. B. and

S. his wife under an agreement or with the understanding that he was to receive the dividends upon the stock transferred during his life.

By his will, dated in 1814, D., after giving to the children of S. an option to take 6000*l.* in satisfaction of the bond and various legacies to D. B. and other persons, devised and bequeathed all the residue of his estate and effects to D. B.

D. died in March, 1817.

Held, that the condition of the bond was to be construed in equity as an agreement made upon consideration of marriage, which might extend beyond the penalty; that the gifts of the lands purchased by D. with personal estate after the date of the bond, and conveyed to D. B. in reversion, subject to a life-interest reserved to D., and also the gifts of the bond for 16,000*l.*, and all other beneficial interests given to D. B., were to be considered as testamentary within the terms of the agreement; and that, as to the gifts of the stock of 20,000*l.* and 35,000*l.* to D. B. and S. his wife, and other partial or contingent interests, the value of the interest of D. B. in such funds was to be estimated as they stood at the death of D., with a view to ascertain what amount of benefit D. B. took under the will and testamentary gifts of D., in order to estimate the proportion to which the parties claiming under the bond were entitled; and that assuming D. B. to take the largest legacy or interest under the will or gifts held to be testamentary, that the parties claiming under the bond should receive out of the residue given by the will of D. a sum equal to such legacy or gifts; and if the residue should be insufficient, then that the legacies and gifts to D. B. and S. should abate in proportion, so as to effect such equality; and after such application of the general residue, if sufficient, &c., that the clear residue should be divided between D. and the parties claiming under the bond.

IN the year 1772, upon a marriage intended to be had between John Wienholt and Sarah Jopson, Daniel Birkett the elder, who was the uncle of Sarah Jopson, executed a bond to T. Norman and J. Graves, of which the condition was as follows:—

“Whereas a marriage is agreed upon and intended with all convenient speed to be solemnized

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“ between John Weinholt and Sarah Jopson, niece
 “ of the above-bound D. Birkett; and whereas the
 “ said D. Birkett hath of his own free will, and in
 “ respect of his approving of the said marriage, and
 “ in consideration thereof, and of the natural love
 “ and affection he beareth to the said S. Jopson,
 “ his niece agreed to make some provision for the
 “ said Sarah, and the issue of the said marriage, in
 “ case the same shall take effect, and the said Sarah,
 “ or any issue of the said marriage shall happen to
 “ be living at the time of the decease of him, the
 “ said D. Birkett, in manner as hereinafter men-
 “ tioned: — Therefore the condition of the above-
 “ written obligation is such, that if the said intended
 “ marriage shall take effect, and the said Sarah, or
 “ any issue of the said intended marriage, shall sur-
 “ vive him, the said Daniel Birkett, and the heirs,
 “ executors, or administrators of the said Daniel
 “ Birkett, do and shall in that case, and also in case
 “ the said Daniel Birkett shall happen to die un-
 “ married, and without any lawful issue, well and
 “ truly pay or cause to be paid unto the said Thomas
 “ Norman and John Graves, their executors or ad-
 “ ministrators, the full sum of 2000*l.* of lawful
 “ money of Great Britain, within the space of twelve
 “ calendar months next after the decease of him the
 “ said Daniel Birkett; but in case the said Daniel
 “ Birkett shall happen to depart this life leaving
 “ a wife, or any lawful issue by him begotten,
 “ living at such his decease, then the sum of 1000*l.*
 “ only of like lawful money of Great Britain, the
 “ said 2000*l.* or 1000*l.*, as the case may happen, to
 “ be paid to them, the said Thomas Norman and
 “ John Graves, their executors or administrators,
 “ within twelve calendar months next after the de-
 “ cease of the said Daniel Birkett, to be by them,

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“ the said Thomas Norman and John Graves,
“ their executors or administrators, applied upon
“ the trusts and for the ends, intents, and purposes
“ following; that is to say, that the said Thomas
“ Norman and John Graves, or the survivor of
“ them, or the executors or administrators of such
“ survivor, shall lay out said sum of 2000*l.* or
“ 1000*l.*, as the case shall happen to be, in some or
“ one of the public stocks or funds, or on govern-
“ ment securities, in trust for the said Sarah; and
“ to permit and suffer her the said Sarah, or her
“ assigns (notwithstanding she may be under co-
“ verture, to receive and take to and for her own
“ separate use, exclusive of her said intended hus-
“ band, or any husband she may hereafter marry)
“ the yearly interest, dividends, and proceeds
“ thereof, from time to time as the same shall be-
“ come due and payable, for and during the term
“ of her natural life, and from and after her de-
“ cease, in trust, for the issue of the said intended
“ marriage, if any such shall be living at the de-
“ cease of her the said Sarah, equally to be divided
“ between them, share and share alike, if more than
“ one, at their respective ages of twenty-one years;
“ and if but one, then the whole to such only
“ child at his or her said age of twenty-one years,
“ with benefit of survivorship, in case any or either
“ of such issue shall happen to die under the said
“ age of twenty-one years; and the interest or di-
“ vidends thereof to be paid and applied in, for,
“ and towards their respective maintenance and
“ education; but if the said Sarah shall happen to
“ survive the said Daniel Birkett, and there shall
“ be no issue of the said intended marriage living
“ at the time of the decease of the said Sarah, or

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“ there being such, all of them shall happen to die
 “ under the said age of twenty-one years, then the
 “ stocks, funds, or securities, so purchased, or to be
 “ purchased with the said sum of 2000*l.* or 1000*l.*,
 “ as the case shall happen, shall be and remain,
 “ in trust for such person or persons, and for such
 “ uses and purposes, and in such parts, shares,
 “ and proportions as she the said Sarah, notwith-
 “ standing her coverture, and whether she shall be
 “ sole or married, by any writing or writings under
 “ her hand and seal, attested by two or more cre-
 “ dible witnesses, or by her last will and testament
 “ in writing, or any writing purporting to be her
 “ last will and testament, to be by her signed,
 “ sealed, and published in the presence of the like
 “ number of witnesses, shall direct, limit, give, or
 “ appoint the same : and in default of such direc-
 “ tion, limitation, gift, or appointment, and as to
 “ such part or parts whereof no such direction, li-
 “ mitation, gift, or appointment shall be made, in
 “ trust for the said John Wienholt, his executors,
 “ administrators, or assigns ; and also if the said
 “ intended marriage shall take effect, and the said
 “ Sarah, or any issue of the said intended marriage
 “ shall happen to be living at the time of the death
 “ of the said Daniel Birkett, and the said Daniel
 “ Birkett shall happen to die unmarried and with-
 “ out issue ; and he the said Daniel Birkett shall
 “ and do, exclusive of the above-mentioned provi-
 “ sion, either by his last will and testament, give
 “ and bequeath, or by some other ways or means
 “ give or leave unto, or in trust for the said Sarah,
 “ or the issue of the said intended marriage, so
 “ much in money, or valuable effects, as the said
 “ Daniel Birkett shall, by such will, give or be-

“queath to any one of his next of kin, or nearest
 “relations, or any other person or persons whom-
 “soever, to be paid within twelve calendar months
 “next after the decease of the said Daniel Birkett,
 “or in case the said Daniel Birkett shall make no
 “such bequest in such will to or in trust for the
 “said Sarah, or the issue of the said intended mar-
 “riage, or if such bequest shall fall short of the
 “greatest bequest in such will to any one of his
 “the said Daniel Birkett’s next of kin, or nearest
 “relations, or any other person or persons whom-
 “soever, then, if the executors or administrators of
 “the said Daniel Birkett shall and do, within twelve
 “calendar months next after the decease of him
 “the said Daniel Birkett, pay or deliver over to the
 “said Thomas Norman and John Graves, or the
 “survivor of them, or the executors or administra-
 “tors of such survivor, such bequest; or make good
 “any deficiency that the same shall fall short of as
 “aforesaid, in trust for the said Sarah and the issue
 “of the said intended marriage, in manner as
 “before-mentioned respecting the said 2000*l.* or
 “1000*l.*, as the case may happen, then the above-
 “written obligation to be void and of none effect;
 “otherwise to be and remain in full force and
 “virtue.”

1838.
 LOGAN
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The marriage was solemnized shortly after the date and execution of the bond. There were issue of the marriage the Respondents and several other children, but all died under the age of twenty-one years, except the Respondents, who had attained their age of twenty-one years.

John Wienholt, and Sarah his wife, both died in the life-time of Daniel Birkett the elder; Sarah Wienholt died on the 24th of June, 1800. The

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Respondents were the only children of the marriage living at the death of their mother.

After the date of the bond, Daniel Birkett the elder had a natural daughter, the Appellant Sarah Logan, who intermarried with Daniel Birkett the younger, the nephew of Daniel Birkett the elder, and afterwards became the wife of Alexander Logan.

In April, 1804, Daniel Birkett the elder caused a case to be prepared by Messrs. Batchelor and Potts, solicitors, and to be laid before Mr. Preston, as counsel, stating the bond, and requesting his opinion, whether by a deed or deeds of gift, reserving a life interest to himself, with power of revocation, he could not alienate his freehold and leasehold estates, so as *pro tanto* to defeat the operation of the bond; and Mr. Preston advised, that such a settlement would be a fraud upon the bond, but suggested that a settlement should be made, without reserving thereby a power of revocation, stating the inclination of his opinion to be, that thereby the effect of the bond might be avoided. In December, 1805, Daniel Birkett the elder, by the same solicitors, applied to Mr. Preston for his further advice, and particularly for his opinion, whether a bond payable after his death, or a transfer of stock to trustees, upon trust to pay the dividends to him for life, and then in trust absolutely for his nephew, would defeat the operation of the bond; and Mr. Preston advised, that a settlement should be made of stock, with a declaration of trust for him for life, in preference to a bond.

Daniel Birkett the elder also employed Mr. Sweet, a solicitor, to prepare a case for the opinion of counsel, as to the means by which he could

avoid the effect of the bond, or withdraw his property from the operation of the agreement manifested thereby; and, accordingly, a case was prepared by Mr. Sweet with that view, and the opinion of counsel taken thereon. Mr. Lambert, a solicitor, was also consulted by Daniel Birkett the elder for the same purpose; and a case was prepared by Mr. Lambert, and laid before counsel for his opinion, as to the mode by which the bond and agreement might be avoided or defeated; and opinions were given upon all such cases by the counsel before whom the same respectively were laid.

After the opinions were taken, Daniel Birkett the elder invested 100,000*l.* in the purchase of real estates.

On the 31st of March, 1814, Daniel Birkett the elder made and published his last will and testament in writing, which bore date and was executed upon that day, and was, with the exception of the formal clauses for the indemnity and reimbursement of trustees, and the appointment of new trustees as follows:—

“ This is the last will and testament of me, Daniel
 “ Birkett, senior, of Hatton Street, Holborn, in
 “ the county of Middlesex, Esquire. I give to
 “ John Stephenson, of Great Ormond Street, Queen
 “ Square, in the county of Middlesex, Esquire, and
 “ Joseph Fitzwilliam Vandercom, of Bush Lane,
 “ London, solicitor, all my household goods, fur-
 “ niture, and fixtures, plate, linen, books, pictures,
 “ wearing apparel; watches, trinkets, china, glass,
 “ wines, liquors, provisions, and other effects in
 “ and about or belonging to my dwelling houses
 “ in Hatton Street aforesaid, and Hadley, in the
 “ county of Middlesex; and also my carriage, and
 “ every thing belonging thereto, in trust, for the

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“ sole and separate use of Sarah Birkett, the wife
“ of my nephew Daniel Birkett, and to assign and
“ dispose of the same as she, notwithstanding her
“ coverture, and as if she were a feme sole, shall
“ direct or appoint. And I give to the same trus-
“ tees the sum of 2,500*l.* sterling, upon the like
“ trusts, for the separate use of the said Sarah
“ Birkett; and I give to my said nephew Daniel
“ Birkett the like sum of 2,500*l.* for his own use;
“ and I give to my said trustees the sum of 20,000*l.*
“ sterling, which I direct shall be laid out by my
“ said trustees in the parliamentary stocks or pub-
“ lic funds of Great Britain, or at interest upon
“ government or real securities, to be varied from
“ time to time as to my said trustees or trustee for
“ the time being shall seem meet. And I declare
“ that they shall stand possessed of the said sum of
“ 20,000*l.*, and the stocks, funds, and securities,
“ in which the same shall be invested, and the in-
“ terest, dividends, and annual produce thereof, in
“ trust for the four daughters of my said nephew
“ Daniel Birkett, that is to say, Caroline, Eliza,
“ Sarah, and Maria, to be divided among them in
“ equal shares as tenants in common, to be inter-
“ ests vested in them, and to be paid to them at
“ their ages of twenty-one years. And I do hereby
“ declare that, in case any of the said daughters
“ of my said nephew shall die under the age of
“ twenty-one years without being or having been
“ married, then and in every such case, as well the
“ share herein originally provided for, as the share
“ or shares by virtue of this present clause surviv-
“ ing to every such child shall from time to time
“ go, remain, and be to the survivors or survivor,
“ and others or other of them, to be divided be-
“ tween them in equal shares, and to be vested

“interests in them, at the same periods as their
 “original portions; but I expressly declare that,
 “upon attaining that age, they shall forthwith be
 “respectively entitled to have raised and paid to
 “them respectively the vested share of the said
 “trust monies, stocks, funds, or securities, without
 “prejudice to their future right by survivorship or
 “accruer as aforesaid. And I declare, that the
 “interest of each child’s portion shall, during their
 “respective minorities, be laid out to accumulate
 “for the benefit of such children respectively.
 “And I give to John Birkett Wienholt and Mary
 “Wienholt, the two children of my late niece Sa-
 “rah Wienholt, the sum of 6,000*l.* sterling, to be
 “equally divided between them; and I declare
 “the same to be in full satisfaction of all claims
 “under my bond, bearing date on or about the
 “8th day of April, 1772. And in case they, or
 “either of them, shall refuse, upon the request of
 “my executor, to execute an effectual release of
 “the said bond, then I revoke the said last-men-
 “tioned bequest of 6,000*l.* And I also give the
 “following legacies sterling.” [Here follow va-
 rious small legacies.]

“And I direct that the servants’ legacies be paid
 “within two months, and all the other foregoing
 “legacies within twelve months next after my de-
 “cease, out of any of my personal property I may
 “have at my decease. My Seathwaite estate in
 “Cumberland, in the occupation of Joseph Hunter
 “and his son William, I give and devise to Joseph
 “Birkett, of Broughton, in the county of Lancaster,
 “to hold, to him, his heirs and assigns for ever:
 “but it is my will, that the present tenants shall
 “have the first year’s rent after my death excused
 “and remitted. And all the rest, residue, and

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“ remainder of my estate and effects whatsoever
 “ and wheresoever, I give, devise, and bequeath
 “ unto my said nephew Daniel Birkett, his heirs,
 “ executors, administrators, and assigns for ever,
 “ to and for his and their own use and benefit ab-
 “ solutely ; and I appoint my said nephew Daniel
 “ Birkett sole executor of this my last will. And
 “ I direct that my said trustees shall be allowed
 “ their costs in the execution of the trusts afore-
 “ said as between attorney and client.”

On the 8th of March, 1817, Daniel Birkett the elder died without issue, and without having been married. He had not in his life-time by any other ways or means than his will, given or left any thing unto, or in trust, for his niece Sarah Wienholt, or her issue, or any of them.

In April, 1818, the Respondent, Mary Wienholt, exhibited in the Court of Chancery her original bill of complaint, which was afterwards amended under various orders. The bill, as finally amended, was against Daniel Birkett the younger, the Appellant Sarah Logan, then Sarah Birkett his wife, Caroline Christiana Birkett, Sarah Margareta Birkett, Maria Garrow Birkett, Edward Stephenson, Thomas Parker, the Appellants John Daniel Birkett, and Charles James Nelson Birkett, Hugh Walton, Joseph Fitzwilliam Vandercom, Thomas Kemble, Daniel Henry Rucker, James Soret, and the Respondent John Birkett Wienholt.

The bill as amended stated the several matters herein-before mentioned. It also, and by way of particular instances of the conveyances and assignments of real and personal estate, and transfers of stock by Daniel Birkett the elder, therein-before more generally mentioned, stated, that on or about the 12th day of May, 1804, he by indenture of

that date, and without consideration, conveyed to James Birkett and William Birkett, and their heirs, certain freehold lands and tenements at Hadley, in the county of Hertford, and Enfield, in the county of Middlesex, to hold the same to the use of himself and his assigns for his life, and from and after his decease, in trust for the Appellant, Sarah Logan, then Sarah Birkett, for her life, for her separate use; and from and after her decease, to the use of Daniel Birkett the younger for life, and after his death, to such uses as the survivor of them, the Appellant Sarah Logan, then Sarah Birkett, and Daniel Birkett the younger should by will appoint; and in default of appointment, to the use of his own right heirs: and he by the same deed assigned over to the same trustees the unexpired term of a house in Queen Square, subject to a rent of 18*l.* 10*s.*, upon the like trusts.

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That, by an indenture of the same date, and also without any consideration, he conveyed certain estates situate in Cheddiston and Linstead, in the county of Suffolk, whereof he was seised in fee, to John Walton and James Birkett, to the use of himself for life, remainder to the Appellant John Daniel Birkett, the eldest son of Daniel Birkett the younger, and the Appellant Sarah, then his wife, absolutely at his the said John Daniel Birkett's age of twenty-one years; and if he died under that age, he gave the same in like manner to the Appellant Charles James Nelson Birkett, the second son of such marriage; and in case of the death of the Appellant Charles James Nelson Birkett, before his age of twenty-one years, then he gave the same to William Birkett, deceased, in fee.

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That, by another indenture bearing date on the 31st day of March, 1814, and also made without any consideration, he conveyed certain other estates situate in Ashfield Thorpe, St. Peter's Westhall Brampton, Cheddiston, Linstead Parva, and Metfield, in the county of Suffolk, whereof he was seised in fee, to John Stephenson and Joseph Fitzwilliam Vandercom, to the use of himself for life, remainder to them, to preserve contingent remainders, remainder to them, upon trust to convey the said estates to the Appellant Charles James Nelson Birkett, in fee, on his attaining his age of twenty-one years; and in case of his death under that age, then to convey the same in like manner to the Appellant John Daniel Birkett; and in case of his death before attaining the age of twenty-one, then to convey the said estates to Daniel Birkett the younger, in fee.


That, by another indenture of the date last mentioned, he also conveyed, without any consideration, certain other estates, situate in Linstead Magna, Metfield, and Withersdale, in the county of Suffolk, of which he was seised in fee, to the last-mentioned trustees, to the use of himself for life, remainder to them, upon trust to preserve the contingent remainders, remainder to them, upon trust to convey the same to the Appellant John Daniel Birkett, in fee, on his attaining his age of twenty-one; and if he died under that age, then, upon trust to convey the same, in fee, to the Appellant Charles James Nelson Birkett, on his attaining his age of twenty-one; and in case of his death under that age, then, upon trust to convey the same to Daniel Birkett the younger, in fee.

That, in the month of March, 1811, he assigned to Daniel Birkett the younger, or deposited with him, a bond for securing the payment to himself of 16,000*l.*, or some other large sum of money, from his former partners in trade, or from some other person or persons; and notwithstanding such assignment, he never gave any notice of the same to the persons from whom the principal monies secured by the bond were due, or to any of them; but he continued to debit them in his books with the interest of such monies, long after the date of the assignment, and up to the time of his death, and to receive such monies for his own use; and it was a part of the condition of the assignment, that he should so receive the interest of the bond for his life.

That, in or about the month of January, 1817, he assigned a mortgage for the sum of 2000*l.*, secured on certain estates situate in the county of Suffolk, to trustees, in trust for himself for life, and, from and after his decease, for the absolute use and benefit of the Appellant Sarah Logan, then Sarah Birkett; and the assignment contained a clause whereby he reserved to himself a power of revocation. And that, in the month of February, 1817, he transferred two sums of 20,000*l.* navy five per cent. annuities, and 35,000*l.* three per cent. consolidated bank annuities, his property, out of his name into the names of Daniel Birkett the younger, and Sarah his wife, in the books of the governor and company of the Bank of England, under the circumstances and with the view hereinbefore mentioned.

The bill, further, and by way of shewing in whom the different estates and interests therein

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and herein-before mentioned had become vested, stated that the Respondent John Birkett Wienholt had become a bankrupt, and that Thomas Kemble, Daniel Henry Rucker, and James Soret had been appointed his assignees, and that he had obtained his certificate.

That Thomas Norman died in 1792, and that John Graves died in 1793, leaving Rowland Stephenson and Robert Glover the executors of his will; that Robert Glover died without having proved the will; that Rowland Stephenson survived him, proved the will, and died, leaving Edward Stephenson the executor of his will, who proved it, and became the personal representative of John Graves.

That the Appellants John Daniel Birkett and Charles James Nelson Birkett had respectively attained the age of twenty-one years: that Eliza Birkett died in the life-time of Daniel Birkett the elder, an infant, and without having been married, and that Caroline Christiana Birkett, Sarah Margaretta Birkett, and Maria Garrow Birkett were infants, and unmarried.

That Daniel Birkett the elder left Mary Anne Bragge, the wife of Isaac Bragge, of Dumfries, in Scotland, the only child of Thomas Birkett, deceased, who was the eldest son of the eldest brother of Daniel Birkett the elder, his heiress at law, and that she was resident out of the jurisdiction of the court: that James Birkett and William Birkett were dead, that William Birkett was the survivor, that he died without issue and without having made any disposition of his trust property, and that he left Mary Anne Bragge, his heiress at law, and Thomas Parker and Isaac

Fisher, the executors of his will, who respectively proved the same, and that Isaac Fisher was dead.

That John Walton survived James Birkett, and died without having made any disposition of his trust property, and leaving Hugh Walton his heir at law ; and that John Stephenson was dead.

The bill then stated, that Daniel Birkett the younger proved the will and codicil of Daniel Birkett the elder, and possessed himself of his personal estate, &c. ; and that the clear surplus thereof amounted to 20,000*l.* and upwards, independently of the personal property assigned and transferred by him in his life-time, as before mentioned ; that his estate, including such property, and the value of the real estate settled and conveyed as before mentioned, exceeded 200,000*l.* ; and that the Respondent, Mary Wienholt, and the assignees of the Respondent, John Birkett Wienholt, in his right were by virtue of the bond, in the events that had happened, entitled to have paid to them out of his estate the sum of 2000*l.*, and also such further sum as would equal the largest amount of property given by Daniel Birkett the elder, by his will, or by the dispositions made in his lifetime to take effect in possession after his death, whether of real or of personal property.

The bill charged, that the property which passed by the residuary clause, in the will of Daniel Birkett the elder, was very large, and was a legacy, or bequest, within the meaning of the agreement set forth in the bond ; and that the several gifts made by him in his lifetime, to take effect in possession after his death, whether of real or personal property, were testamentary dispositions by will within the meaning of the bond and

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the agreement therein contained, and that real estate was within the meaning and intention thereof; or if not, that the personal property having been invested in real estate for the purpose of taking it out of the effect thereof, such investment was a fraud upon the bond, and that such real estates ought either to be considered personal estate, as against the parties claiming under the same, or as a security for the amount of the personalty invested in the purchase thereof: that all the conveyances, settlements, transfers, and assignments, therein mentioned to have been made by Daniel Birkett the elder, were made without any consideration whatsoever, as mere gifts; and that he, either by written instructions, or by some verbal agreement or arrangement, or by some understanding between the parties, reserved a life-interest in all the property conveyed, settled, assigned, and transferred by him; and that the gifts were only reversionary, and were not to take effect in possession and enjoyment till after his death; and that all such conveyances, settlements, assignments, and transfers, were void as against all persons claiming under the bond.

The bill prayed, that the Respondent, Mary Wienholt, might be declared to be entitled to have the agreement manifested by the condition of the bond, specifically performed; and that an account might be taken of all the real and personal property of Daniel Birkett the elder, conveyed, settled, assigned, or transferred by him, without consideration, to or in trust for Daniel Birkett the younger, and the Appellant, Sarah, then his wife, or either of them, or their or either of their issue, or in any manner for their

benefit, subject to any trust for, or power or interest reserved to Daniel Birkett the elder, either absolutely, or for the term of his life ; and that all such conveyances and assurances, settlements, assignments, and transfers, might be declared to be frauds, as against the Respondent, Mary Wienholt, claiming under the bond, and to be subject to the agreement therein, in the same manner as if Daniel Birkett the elder had disposed of the same, or as to the real estates of the amount of the monies invested in the purchase thereof, by will ; and that an account might be taken, under the decree of the Court, of his general personal estate, debts, funeral and testamentary expenses, and legacies ; and that the same might be applied in a due course of administration ; and that an account might be taken, in like manner, of all the real or personal estate so conveyed, settled, assigned, and transferred as therein and hereinbefore mentioned, and the rents, profits, and produce thereof, and the proceeds of the sales thereof possessed or received by the Defendants to the bill, or any or either of them, or in trust for them, or any or either of them ; and that the value of the property to which the Respondent, Mary Wienholt, was entitled under the agreement, and the value of what she was entitled to under the will of Daniel Birkett the elder, might be ascertained ; and in case it should appear that it was most beneficial for her to receive the share of the legacy of 6,000*l.*, bequeathed by his will, then that the same might be paid to her ; and in case it should appear to be most beneficial to her to take the benefit secured to her by the bond, then that the same might be made good to her out of the estate of Daniel

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Birkett the elder, which passed by his will, or by the several dispositions made by him in his lifetime; and that all necessary directions might be given for enabling the Respondent, Mary Wienholt, to make her election between the legacy given by such will and the benefit provided for her by such bond; and that whatever she might be ultimately entitled to might be paid to her, and for an injunction and receiver, and for the deposit of deeds in the meantime.

Daniel Birkett the younger died before he had answered the bill, having made his will, and appointed the Appellant, Sarah Logan, then Sarah Birkett, his wife, and James Quilter, his executrix and executor. They proved the will, and in November, 1818, the Respondent, Mary Wienholt, exhibited a bill of revivor against them; and the suit was revived.

The Appellant, Sarah Logan, then Sarah Birkett, widow, and James Quilter appeared and put in their joint and several answer to the original bill and bill of revivor, and thereby stated their belief of the marriage of John Wienholt and Sarah Jopson, that Sarah Jopson was the niece of Daniel Birkett the elder, and that Daniel Birkett the elder executed the bond, hereinbefore stated, previously to and in consideration of the marriage.

They also stated their belief, that there were issue of the marriage several children; that the Respondents were two of them; that all the children of the marriage died under the age of twenty-one years, except the Respondents; that they had attained the age of twenty-one years; that John Wienholt and Sarah Wienholt his wife died in the lifetime of Daniel Birkett the elder; and that

Sarah Wienholt died at or about the time in the bill mentioned.

They also admitted the will and codicil of Daniel Birkett the elder, as in the bill stated, — his death without having been married, — and the proof of his will and codicil by Daniel Birkett the younger.

And they also thereby admitted the transfer, without consideration, by Daniel Birkett the elder, into the names of Daniel Birkett the younger, and of the Appellant, Sarah Logan, then Sarah Birkett, his wife, of two several sums of 20,000*l.* navy 5 per cent. annuities, and 37,000*l.* 3 per cent. consolidated bank annuities; and the assignment, without consideration, by Daniel Birkett the elder to or in trust for Daniel Birkett the younger, of a bond conditioned for the payment of 16,000*l.*; but they denied, to the best of their knowledge and belief, that such transfers and assignments were subject to any trust; or that any trust was declared thereof for or in favour of Daniel Birkett the elder, or that he retained any interest in or power over the bank annuities or bond debt, or that there was any agreement or understanding respecting them.

The Appellant, Sarah Logan, then Sarah Birkett, widow, afterwards put in a separate answer to the amended bill, — and thereby denied, to the best of her knowledge and belief, that Daniel Birkett the elder did, at any time before his death, for the fraudulent purpose of defeating or avoiding the agreement contained in the bond, or for any other purpose, deliver over to Daniel Birkett the younger, or to her then his wife, or to trustees nominally for them, any mortgages or securities for money, property, and effects, without

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consideration, save that he did in his lifetime deposit the bond for 16,000*l.* with Daniel Birkett the younger for his absolute use ; and she denied, that the same was so delivered and assigned, or deposited upon any trust or understanding, either verbal or written, expressed or implied, that such bond should be subject to the disposition of Daniel Birkett the elder, or that he should have any right or interest in or control over the same ; but she admitted, that it was understood or intended that he should have the interest secured or made payable by the bond during his life, after the assignment or delivery thereof to Daniel Birkett the younger ; and that Daniel Birkett the younger made and executed to Daniel Birkett the elder a bond or obligation for payment to him of the amount of the interest of such bond ; but she denied that, to her knowledge and belief, Daniel Birkett the elder, in his books, debited the obligors in such bond, or the persons from whom the monies were due, with the interest thereof, after the date of the assignment and delivery thereof, but she stated, that she had understood and believed that the several obligors in such bond had notice of such assignment having been made.

She thereby also stated her belief, that it was the intention and understanding of the parties, and in particular of Daniel Birkett the elder, when the transfers of stock were made by him, that he should have and receive the dividends of such stocks, or funds, for his life ; and she admitted, that, some time before the transfer was made, he had agreed to make such transfer to herself and her late husband, or one of them ; but she denied that, to her knowledge and belief, the same was

done upon the importunity of Daniel Birkett the younger; and she denied, that it was done upon her importunity: she admitted, that he agreed to make and made such transfer for the purpose of diminishing the amount of his property, which was to pass by his will, although she denied that it was to evade or defeat the agreement contained in the bond; and she denied, also, that he consented to make such transfers or any of them upon any written declaration of trust or agreement being made, or under any verbal promise, that such stock should be retransferred to him whenever he should call for the same; although she admitted, that it was understood and agreed, that the dividends of such stocks or funds should be paid to him.

Afterwards the Respondent, John Birkett Wienholt, procured from his assignees, as was admitted by them, an assignment of his interest under the agreement and bond, and James Quilter died, having made his will, and appointed James Quilter the younger, Henry Sampson Quilter, and George Quilter, his executors; whereupon James Quilter the younger, and Henry Sampson Quilter alone proved the will, and a bill of revivor and supplement was exhibited against the Respondents, John Birkett Wienholt, and James Quilter, and Henry Sampson Quilter, in respect thereof, and the suit was revived.

The Appellant, Sarah Logan, had, in the meantime, intermarried with Alexander Logan; and, upon her marriage, all the real and personal estate to which she was entitled under the wills of Daniel Birkett the elder and Daniel Birkett the younger, with the exception of a sum of 10,000*l.*, agreed to

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be paid or secured to her husband, was, by indentures of lease and release bearing date respectively the 20th and 21st days of May, 1821, conveyed and assigned to Albert Goldsmid, and the Appellants, John Daniel Birkett, and Charles James Nelson Birkett, for her separate use; and a supplemental bill was exhibited in respect thereof against Albert Goldsmid and the Appellants, John Daniel Birkett, and Charles James Nelson Birkett.

The Appellant, Sarah Logan, under an order obtained for that purpose, afterwards appeared and put in a further separate answer to the amended bill; by which she stated, that Daniel Birkett the elder, after the date of the bond, acquired large property; of which he did not intend Sarah Wienholt, or her issue, to take the bulk, or any considerable proportion; and therefore bequeathed to the Respondents 6000*l.* in satisfaction of all claims under the bond. That Daniel Birkett the elder intended to prevent the Respondents from taking any part of his estate, except what he might leave them by his will, or they might be entitled to under the strict construction of the bond; and he, therefore, disposed of the bulk of his property, so as to prevent his will operating thereon, and to limit the operation of the bond to a portion only of his property: that for such purpose, he employed solicitors and consulted counsel; and invested large sums of money in the purchase of real estate; and that one of his reasons for so doing, was to put the money so invested out of the reach of the bond; and she thereby admitted, that he also made assignments of leasehold property, for the purpose of disposing of the same in his life, so as not to be subject to his will. And that he assigned

the 16,000*l.* bond debt, and the 2000*l.* mortgage debt, and a mortgage debt of 1523*l.* 17*s.* 2*d.* on Saint Mary Hill estate ; and that such assignments were made without valuable consideration. And she admitted, that Daniel Birkett the elder continued to receive the interest of the money secured by such bond to the time of his death. But she denied that it was agreed that the testator should have the power of disposition over the property settled and assigned ; or that there was any secret or other trust as to the property, save as appeared by the conveyances and assignments ; and she admitted that Daniel Birkett the elder transferred the 20,000*l.* navy 5*l.* per cents., and 37,000*l.* 3*l.* per cent. consols to Daniel Birkett the younger and herself, without any valuable consideration ; and that it was the intention, if Daniel Birkett the elder had lived, to pay to him the dividends of such stock during his life ; and stated her belief, that Daniel Birkett the elder meant that such stock should not be subject to his will or to the bond.

The other Defendants to the bill having answered, the answers were replied to, and witnesses examined, who proved the several conveyances, assignments, transfers, and dispositions of property before detailed.

On the 31st of May, 1825, the cause came on to be heard before the Lord Chancellor.

By the decree of that date, it was declared, that the condition of the bond of the 8th day of April, 1772, wherein Daniel Birkett the elder bound his real and personal representatives, and which bond was executed previous to the marriage of John Wienholt

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and Sarah Jopson, the niece of Daniel Birkett the elder, contained an agreement entered into by Daniel Birkett the elder, in consideration, and expressed to be entered into in consideration of the intended marriage between John Wienholt and Sarah Jopson, which ought to be specifically executed by the court according to the true intent and meaning thereof; and that the parties intended to be benefited by such agreement were not bound to accept the penalty of the bond, or the legacy given by the will of Daniel Birkett the elder, but were entitled in equity to have the full benefit of the provision agreed to be made in manner in the condition mentioned. And it was declared that, Daniel Birkett the elder having died unmarried and without lawful issue, the sum of 2,000*l.* ought to be paid out of his estate, according to the agreement for the benefit of the parties entitled thereto, with interest at four per cent. from one year after his death, and that, exclusive of such provision, he ought to be considered as having engaged by will, or otherwise, to give or leave to or in trust for the parties meant to be entitled to the benefit of the agreement in the condition of the bond, so much in money, or in valuable effects, as he should give or leave to any one of his next of kin, or nearest relations, or any other person or persons, to be paid within twelve calendar months next after his decease; or if he should make no such bequest in his will, or the same should fall short of the greatest bequest in such will, then that his executors or administrators should, for the benefit of such parties as aforesaid, pay or deliver over such bequest, or make good any deficiency that the same should so fall short of.

And it was declared, that it appeared to the Court that, according to the construction of the agreement contained in the bond, the Respondents electing to take under the agreement contained in the condition of the bond, and not to accept the 6000*l.* bequeathed by the will, if they were more beneficially entitled under the agreement, were entitled to claim so much of the personal property of Daniel Birkett the elder, disposed of by his will, as would be equal in value to the largest amount of what was thereby bequeathed to any person or legatee, whether specific, pecuniary, or residuary legatee. And it was declared further, that the assignment of the 16,000*l.* bond debt, the 2000*l.* mortgage debt, the transfers of the 37,000*l.* 3 per cent. annuities, and 20,000*l.* navy five per cent. annuities; and all other voluntary dispositions of personal property, remaining personal at the death of Daniel Birkett the elder, in which he reserved or retained a life-interest, or over the dispositions of which he had a controlling power of appointment or revocation, ought to be considered in equity, for the purpose of giving effect to the true intent and meaning of the agreement in condition of the bond, as having the same effect as if such sums of 16,000*l.*, 2,000*l.*, 37,000*l.* three per cent. annuities, 20,000*l.* navy five per cent. annuities, and such other personal property, so voluntarily disposed of, had been bequeathed by his will to the persons after his death respectively entitled thereto; and that the Respondents, electing as aforesaid, were entitled to claim out of his real and personal property devised and bequeathed by his will, and out of the sums, annuities, and personal property so voluntarily disposed of, so much as would be

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equal in value to the largest amount of what, by his will, any such assignment, transfer, or voluntary disposition, all or any of them, was bequeathed or given to, or bequeathed and given to any other person.

And it was ordered and decreed, that it should be referred to the master in rotation, to enquire and state, whether Daniel Birkett the elder in his lifetime made any and what other voluntary dispositions as to his personal estate which would fall within the declaration as to voluntary dispositions thereinbefore contained, and to whom and under what circumstances. And it being admitted, that the sums of 37,000*l.* bank three per cent. annuities, and 10,500*l.* new four per cent. annuities, which had been substituted for 10,000*l.*, part of the 20,000*l.* navy five per cent. annuities, were then standing in the names of the Appellant, Sarah Logan, and of Joseph Petty Toulmin and David Robert Remington, upon trust, to abide the event of the suit; and the said Joseph Petty Toulmin and David Robert Remington, by their counsel, consenting to act as the Court should direct, it was ordered that Alexander Logan and the Appellant, Sarah his wife, and Joseph Petty Toulmin and David Robert Remington, should transfer the 37,000*l.* bank three per cent. annuities, and 10,500*l.* new four per cent. annuities, into the name, and with the privity of the accountant-general of the Court, in trust, in the cause; and pay the dividends to accrue thereon until the transfer, in like manner; but such transfer and the declaration thereinbefore contained as to the 37,000*l.* bank 3*l.* per cent. annuities, and 20,000*l.* 5*l.* per cent. annuities, were to be without prejudice to the ques-

tion respecting the effect of the transfer of such annuities by Daniel Birkett the elder, having been made into the joint names of Daniel Birkett the younger, and the Appellant, Sarah, then his wife; and it was ordered, that it should be referred to the master to enquire under what circumstances, and with what intention Daniel Birkett the elder transferred the 37,000*l.* bank three per cent. annuities, and 20,000*l.* navy five per cent. annuities, into such joint names, with respect to the interest which they, or either of them, should take in such funds, and the master was to report to the Court all such evidence and special circumstances which might be laid before him thereon as he might think necessary for the information of the Court; but the same was to be without prejudice to the question of law as to its admissibility and its effect, and any of the parties were to be at liberty to apply to the Court touching such dividends, and the future dividends of such annuities, and the future dividends of the 3000*l.* East India stock and 900*l.* 13*s.* 9*d.* bank stock therein mentioned, to be standing in the name of the accountant-general, in trust, in the cause *Wienholt v. Birkett*, as they should be advised, and, in the meantime, till further order, such dividends were not, nor was the sum of 251*l.* 2*s.* 2*d.* cash therein mentioned to be in the bank, placed to the credit of the cause, to be paid to any party subject to the direction thereafter contained. And it was ordered, that the dividends to accrue on the said 37,000*l.* bank three per cent. annuities, and 10,500*l.* new four per cent. annuities, should be laid out in the purchase of bank three per cent. annuities in the name and with the privity of the accountant-general, in trust in the said cause; and

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he was to declare the trusts thereof accordingly; and it being alleged, on the part of the Respondents, that Daniel Birkett the elder, in his lifetime, upon various occasions, and at various times, laid out considerable sums in the purchase of lands, whereof he took the conveyances and assurances to himself, or to trustees for himself in fee, and afterwards at different times, made conveyances and assurances, whereby he reduced himself to be tenant for life with remainder or remainders to others; several of the conveyances and assurances respectively so reducing his estate, bearing, as it was alleged, the same date, and being executed at the same time; and it being also alleged, that he had laid out considerable sums in the purchase of lands, the conveyances or assurances of which were, in the first instance, taken to or in trust for himself for life, with remainder or remainders over; and it being insisted, on the part of the Respondents, that such real estate, or the monies with which the same were respectively purchased, ought to be considered as property in which they would be in equity entitled to a share or part, under the true meaning of the agreement contained in the condition of the bond, or by reason that such the acts of Daniel Birkett the elder were done under such circumstances, with such undue intent to defeat the effect of the said agreement, that the same ought in equity to be considered as bound and affected by the agreement, although the parties claiming under such voluntary instruments derived their estates, not from his testament, but from conveyances and assurances made in his lifetime, it was ordered, that the master should enquire and state to the Court what purchases were made by Daniel Birkett

the elder of real property, after the execution of the bond, of which the conveyances or assurances, and of what dates, were originally taken, either to himself, or in trust for himself in fee, and as to which, by subsequent acts, assurances or conveyances, and of what dates, he afterwards reduced himself to be tenant for life in law or equity, and with remainder or remainders to other person or persons, and to whom, and also what purchases of real property were made by him after the execution of the bond, taking the conveyances or assurances thereof, and of what dates, to or in trust for himself for life, with remainder or remainders over, and to whom; and it was ordered, that all parties should be at liberty to lay before the master such evidence as he might think material, either by affidavit or interrogatories, or both, as he might think fit, for the information of the Court, as to the intent of Daniel Birkett the elder in each and every of the transactions of such purchases, conveyances, and assurances; and especially with reference to their proposed effect, as to the operation of the marriage bond; and the master was to report to the Court, all such evidence, and all circumstances which he might think necessary for the information of the Court; and was to be at liberty to make a separate report as to such matters; and it was declared, that the Respondents would be entitled, according to the true intent and meaning of the agreement contained in the condition of the bond, to be creditors on the estate of Daniel Birkett the elder to the amount of such sum as, under the declarations thereinbefore made, they would be entitled to claim, and such further sum, if any, as the Court might thereafter declare them further

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entitled to, after the master should have made his report upon the matters above referred to him, and with such interest as the Court might think proper to order. And the consideration of what sum was due, and what interest might be due, and was to be paid to them out of the estate, or estates, of Daniel Birkett the elder; or how the same was ultimately to be borne by the several persons claiming his property, was reserved, until the master should have made his report, and the Court should have given directions thereupon. But it was ordered, that the master should take an account of the personal estate of Daniel Birkett the younger, deceased; come to the hands of Alexander Logan and the Appellant, Sarah his wife, and James Quilter, deceased, since the death of Daniel Birkett the younger, or any person or persons by their, or any or either of their order, or for their or any or either of their use, including what might have been received under the voluntary dispositions of personal estate, as to which the Respondents were thereinbefore declared to be entitled to be relieved. And it was ordered, that what, on taking such account, should appear to have come to the hands of Daniel Birkett the younger, should be answered by Alexander Logan, and the Appellant, Sarah his wife, and James Quilter the younger, out of the assets of Daniel Birkett the younger, come to their hands respectively in a course of administration. And in case they should not admit assets for that purpose, it was ordered, that they should come to an account before the master for the personal estate of Daniel Birkett the younger, come to their hands, or to the hands of either of them, or to the hands of any person or persons by their or either of their

r, or for their or either of their use. And it ordered, that what, on taking such account of personal estates of Daniel Birkett the elder, Daniel Birkett the younger, should appear to come to the hands of Alexander Logan, should be answered by him personally. And it ordered, that what, on taking such accounts, should appear to have come to the hands of the appellant, Sarah Logan, alone, should be answered. Albert Goldsmid and the Appellants, John Daniel Birkett, and Charles James Nelson Birkett, of the separate estate of the Appellant Sarah Logan, come to their hands under the indenture of the 21st day of May, 1821. And in case they should not admit assets for that purpose, then it ordered, that the Appellants, John Daniel Birkett and Charles James Nelson Birkett, and Albert Goldsmid, should come to an account before the Master for the separate estate of the Appellant, Sarah Logan, come to their or any or either of their hands under or by virtue of such indenture, or to the hands of any person or persons for their or either of their order, or for their or either of their use, but the last-mentioned direction was to be without prejudice to the liability of Alexander Logan, in case the separate estate of the appellant, Sarah Logan, should be insufficient to answer what should be found due from her. And it ordered, that what, on taking the accounts, by or either of them, of the personal estates of Daniel Birkett the elder, and Daniel Birkett the younger, should appear to have come to the hands of James Quilter, deceased, should be answered by James Quilter the younger, his surviving executor, of the assets of James Quilter, deceased, in a

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due course of administration. And in case he should not admit assets for that purpose, it was ordered, that he should come to an account before the Master for the personal estate of James Quilter, deceased, come to his hands, or to the hands of any person or persons by his order, or for his use, and the usual directions were given as to the debts and funeral expenses of Daniel Birkett the elder; and the consideration, whether any and what account, and against whom should be directed, of any rents and profits of any real estates, was reserved, until after the Master should have made his report as to the matters respecting purchases, conveyances, and assurances, of the real estates thereinbefore directed. And it was ordered, that the Master should compute interest on the sum of 2000*l.* to which the Respondents were thereinbefore declared entitled, at the rate, and from the time thereinbefore mentioned, and he was to state what was due for principal and interest in respect of the sum of 2000*l.*; and also to tax the costs of the suit of all parties to that time, and also the costs of Joseph Petty Toulmin and David Robert Remington in appearing and submitting to the decree, such last-mentioned costs, and also the costs of such of the said defendants as were trustees and executors, to be taxed as between solicitor and client, and the Master was to make a separate report of such principal and interest and costs; and directions were given for the payment thereof. And the Master was to be at liberty to make a separate report, or separate reports, of any of the matters thereby referred to him. And the consideration of subsequent costs, and of interest not specifically thereinbefore reserved, and the consideration of all further directions, was reserved.

until after the Master should have made his general report.

The Master to whom the cause was transferred made two separate reports, bearing date respectively on the 31st of January, and the 13th of June, 1826; and a general report bearing date on the 26th of August, 1826. By the former separate report, the Master computed the principal and interest due in respect of the sum of 2000*l.*, and taxed the costs directed by the decree. By the latter separate report, he set forth an account of the voluntary dispositions of personal estate, and settlements of real estate, as to which enquiries were directed by the decree, and stated the circumstances under which the same were made. By his general report, the Master certified the circumstances under which the transfer of the sums of 37,000*l.* three per cent. consolidated annuities and 20,000*l.* navy five per cent. annuities into the names of Daniel Birkett the younger, and the Appellant, Sarah, then his wife, had been made; and set forth the accounts directed to be taken, and certified a balance of 32,125*l.* 1*s.* 3*d.* to be due from Daniel Birkett the younger in respect of the personal estate of Daniel Birkett the elder; a balance of 41,964*l.* 8*s.* 6*d.* to be due from the Appellant, Sarah Logan, in respect of such estate, and a further balance of 9828*l.* 14*s.* 5*d.* to be due from her in respect of the personal estate of Daniel Birkett the younger.

Two exceptions were taken to the general report by the Appellants, and by Albert Goldsmid and Caroline Christiana, his wife, Sarah Margareta Birkett, and Maria Garrow Birkett; the purport was, that the Master had, in taking the accounts, considered the mortgage on the estate in the island

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of Tobago as the property of Daniel Birkett the elder, instead of treating the same as the property of Daniel Birkett the younger.

On the 7th of March, 1829, the cause came on to be heard on the exceptions, and for further directions, before the Vice Chancellor.

In the mean time, a petition, entitled as well in the said cause, as also in another cause of Birkett and others against Birkett and others, which had been instituted for the administration of the estate and effects of Daniel Birkett the younger, was presented to the Court for the purpose of obtaining a transfer into the first-mentioned cause of the sum of 22,695*l.* 1*s.* 8*d.* bank three per cent. annuities, standing to the credit of the last-mentioned cause, and appearing to be the proceeds of the investment of the bond debt for 16,000*l.* assigned by Daniel Birkett the elder, in trust for Daniel Birkett the younger; and also of so much of the sum of 40,181*l.* 10*s.* 10*d.* bank three per cent. annuities, standing to the like credit, and appearing to be part of the estate of Daniel Birkett the younger, as would be equal to the sum certified to be due from him to the estate of Daniel Birkett the elder; and such petition was ordered to come on, and accordingly came on for hearing at the same time with the first-mentioned cause for further directions and on the exceptions.

By the decree or order then made, it was ordered that the exceptions should be over-ruled. And it was declared, that the several voluntary dispositions of personal estate made by Daniel Birkett the elder, in his lifetime, as mentioned in the first schedule to the Master's separate report of the 13th of June, 1826, were to be considered in equity, for the purpose of giving effect to the

true intent and meaning of the agreement, contained in the condition of the bond, as having the same effect as if the personal estate, voluntarily disposed of, had been bequeathed by his will to the persons who, after his death, were intended to take the benefit of such dispositions. And it was declared, that the transfers by Daniel Birkett the elder of the 37,000*l.* three per cent. annuities, and 20,000*l.* navy five per cent. annuities, into the joint names of Daniel Birkett the younger and the Appellant, Sarah, then his wife, were to be considered for the purpose of giving effect to the true intent and meaning of the agreement, as giving to Daniel Birkett the younger the same benefit as if such 37,000*l.* three per cent. annuities, and 20,000*l.* navy five per cent. annuities, had been transferred by him into the sole name of Daniel Birkett the younger, or been bequeathed to Daniel Birkett the younger by his will; but such declaration was to be without prejudice to any question as to the interests of Daniel Birkett the younger and the Appellant, Sarah, his wife, in such bank annuities as between the estate of Daniel Birkett the younger and the Appellant, Sarah Logan. And it was declared, that it appeared to the Court that, according to the true construction of the agreement contained in the condition of the bond, all testamentary dispositions of freehold and copyhold and leasehold estates, and dispositions of that nature which, by the decree in the cause, were declared to be of the nature of testamentary dispositions, were within the intent and meaning of the agreement. And it was declared, that all the several freehold and copyhold estates purchased by Daniel Birkett the elder, after the execution of the bond, and

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mentioned in the second schedule to the separate report of the 13th of June, 1826, were to be considered in equity for the purpose of giving effect to the true intent and meaning of the agreement, as if such real estates respectively had been given, or devised by his will. And it appearing, that Daniel Birkett the younger was the person to whom by such testamentary dispositions, or dispositions in the nature of testamentary dispositions, the largest benefit was given, it was ordered, that it be referred to the Master to whom the cause stood referred to compute what, at the time of the death of Daniel Birkett the elder, would have been the amount and value of the benefits which Daniel Birkett the younger would have taken under such several dispositions, according to the declarations contained in the decree made on the hearing of the cause, and in that order, if the bond had not been made. And it was declared, that the Respondents were entitled to stand as specialty creditors upon the estate of Daniel Birkett the elder, for a sum equal to such amount and value, with interest thereon, at four per cent. per annum, from the end of a year from his death. And it was ordered, that the Master should compute what was due to them for principal and interest, according to the aforesaid declarations; but in making such computation the Master was to charge them with the dividends, so far as they had been received by them, of 24,096*l.* 7*s.* 8*d.* three per cent. annuities, part of the 37,000*l.* like annuities which were therein mentioned to have been transferred to their contingent account, by virtue of an order of the Court bearing date the 23d of March, 1827, as the interest received by them upon the principal sum of 20,000*l.*; such sum of

24,090*l.* 7*s.* 8*d.* three per cent. annuities being taken to be of the value of 20,000*l.* And it was ordered, that the sum of 24,096*l.* 7*s.* 8*d.* bank three per cent. annuities, standing in the name of the Accountant-general, in trust, in the cause *Wienholt v. Birkett*, the contingent account of the Respondents, should be transferred to them in moieties in satisfaction of the principal sum of 20,000*l.*, part of the debt due to them. And further, it was declared that, as between the parties taking the freehold and personal estate of Daniel Birkett the elder, the general personal estate must be first applied; then the personal estate specifically bequeathed or disposed of; and lastly, the freehold estates, in satisfaction of the demand of the Respondents. And it was ordered, that so much of the sum of 40,181*l.* 10*s.* 10*d.* bank three per cent. annuities, standing in the name of the Accountant-general, in trust, in the cause *Birkett v. Birkett*, as at the market price of such annuities on the day of the date thereof were of the value of 32,125*l.* 1*s.* 3*d.* by the Master's general report before mentioned, certified to be due from Daniel Birkett the younger, should be carried over by the Accountant-general to the credit of the cause under the title *Wienholt v. Birkett*. And it was ordered, that the sum of 23,894*l.* 13*s.* bank three per cent. annuities, standing in the name of the Accountant-general, in trust, in the cause *Birkett v. Birkett*, the account of the apparent estate of Daniel Birkett the elder, which was purchased with the 16,000*l.* bond debt in the decree mentioned; and the accumulations thereof, since the transfer to such last-mentioned account, if any, should be also carried over to the

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credit of the cause under the title *Wienholt v. Birkett*. And it was ordered, that the Master should take the subsequent accounts of the personal estate of Daniel Birkett the elder, received by Alexander Logan and the Appellant, Sarah, his wife, including what might have been received under the voluntary dispositions of personal estate, as to which the Respondents were thereby and by the decree in the cause declared to be entitled to be relieved. And it was ordered, that what should have come to the hands of Alexander Logan should be answered by him, and what should have been received by the Appellant, Sarah Logan, should be answered by her trustees out of her separate estate. And it was ordered, that the Master should enquire who had been in possession of and in receipt of the rents and profits of the real estates of Daniel Birkett the elder since his decease; and in case the Master should find that Daniel Birkett the younger, deceased, or any of the parties to the suit, had been in the possession or receipt of the rents and profits of such real estates or any of them since such his decease, then it was ordered, that the Master should take an account of the rents and profits of such real estates come to the hands of Daniel Birkett the younger, deceased, or to the hands of any of the parties to the suit, or to the hands of any person or persons by their or any of their order, or for their or any of their use; and in case the funds in Court, and other property applicable thereto under the decree, should not be sufficient to answer what should be found to have been received by Daniel Birkett the younger, it was ordered, that the deficiency be answered by the Appellant, Sarah Logan, his executrix, out of

his estate and effects. And it not appearing, by the Master's report, by whom the rents, dividends, and interest of the separate estate of the Appellant, Sarah Logan, had been received, it was ordered, that the Master should enquire and state to the Court who, since the date of the decree, had been entitled to receive the rents, dividends, and interest thereof, and to whom the same had been respectively paid; and in case he should find the Appellant, Sarah Logan, to have been in the receipt and enjoyment of such rents, dividends, and interest, it was ordered, that he should enquire whether her receipt thereof respectively was or not with the permission of her trustees; and state the particulars of such separate estate, and what had become thereof, and state special circumstances; and it was ordered, that the Master should tax all parties their subsequent costs of the suit to that time, the costs of such of the defendants as were trustees or executors to be taxed as between solicitor and client; and he was to be at liberty to make a separate report thereof; and it was declared, that such last-mentioned costs, as well as the costs already taxed and paid, were to be borne and paid by and out of the residuary personal estate of Daniel Birkett the elder; and directions were given for the payment of a debt by the Master's general report certified to be due to Samuel White Sweet and Charles Scott Stokes, together with the amount of such costs. And it was ordered, that the Master should state how much was due to the Respondents for interest, and how much for capital; and all further directions were reserved until the Master should have made his report.

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The appeal was from the original decree, and from the order, on further directions.

The case was argued, first, in February; and afterwards in July, 1852, by Sir Charles Wetherell and Mr. Pepys, for the Appellant; and by Sir Edward Sugden and Sir W. Horne, for the Respondent.

The principal authorities cited were, *Jones v. Martin*, 3 Anst. 882., and in note to *Randall v. Willis*, 5 Ves. 266. *Purdew v. Jackson*, 1 Russ. *Chillener v. Chillener*, 2 Ves. 528. *Lewis v. Madocks*, 8 Ves. 150. 17 Ves. 48. *Turner v. Jennings*, 2 Vern. 612. 685. *Tomkyns v. Ladbroke*, 2 Ves. 591.

In the course of the argument Lord Eldon said, "If a man covenants to leave as much to one child as to any other, he may give any part to one in his lifetime, and leave the rest to be divided at his death, and that will satisfy the covenant. But if he gives the reversion to the child, reserving a life-interest for himself, it is a fraud upon the covenant, as it was held to be in the case of a power where a father appointed the bulk of a fund to one of his children who was in a consumption."

He also said that, as to the real estate purchased, it was left to the Master, upon the original decree, to enquire as to the circumstances under which the real estate had been purchased; and that the evidence before the Master shewed a case of fraud upon the agreement which the courts could not permit to be practised.

The Lord Chancellor said, that the testator was at liberty to do as he pleased with the property du-

ring his life, if he acted *bond fide* ; that the mere laying out the personalty in land would not constitute fraud ; but the fraud was in giving the land afterwards, reserving the life-interest, whereby, at his death, the donee got money through the *medium* of land ; that he might have left it to descend to his heir ; but the fraud was in the contrivance to retain the enjoyment, and yet devise it in breach of the covenant.

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*The Lord Chancellor.** — The noble Lords who have heard the argument concur in opinion, that the bond must be construed as an agreement. This is the foundation of the original decree. The difficulties which have pressed, and the doubts which have occurred to us, arise from what has since been done by the decree upon further directions ; and these doubts, which apply to more than one part of the case, have not been removed in the course of the argument. It will be necessary, therefore, to take farther time for consideration. Without stating, at present, any positive opinion upon the questions arising out of the decree on farther directions, I feel a strong inclination of opinion upon one or two points. As to the 57,000*l.* which the Vice-Chancellor treated as if it had been transferred to Daniel Birkett the younger, I will say nothing decisive at present, although I feel some doubt ; but I am disposed to dissent from that part of the decree which treats all the property as within the meaning of the agreement. If it were now necessary to give my opinion, I should say that the agreement, according to sound

* At the conclusion of the argument, read the

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construction, is confined to personalty; and I have also some doubts as to that part of the decree which relates to after purchased estates. But the point on which I am the most disposed to question the propriety of the decree relates to the direction to the Master as to the mode of computing what is to be given to the Respondents under the agreement. That they are entitled to stand as specialty creditors there could be no doubt. The substance of the agreement is, that Sarah Jopson is to have as much as the person most favoured by the bequests of the testator, on succession to his property. But according to the scheme of computation directed by the decree, the favoured person would take next to nothing, and the party claiming under the agreement would take the bulk of the property. The mode in which the compensation ought to be made deserves particular consideration, and it would be convenient if each party would give in proposals of the order which is expected from the House.

Lord Plunket. — Some points appear to have been designedly left open in the original decree by Lord Eldon, as whether the agreement related to realty; upon which, if the matter were now to be decided, I should say that it related only to personalty, and not to realty, except so far as it grows out of personalty; and then a serious question would arise, whether you could follow the motive, and decide that his object was to increase one fund and diminish the other fraudulently. Upon the question as to the transfer of the stock, I have not yet arrived even at an inclination of opinion; but as to the amount of compensation to be given to Sarah Jopson under the contract,

it cannot be so construed as to give almost all to her, and to the others next to nothing. The terms import that she is to have as much as any other. If the course directed by the Vice-Chancellor's decree, is to be followed, the words ought to be very clear.

Lord Eldon said he did not then propose to make any observations on the point in question, but desired that the respective parties would send in their proposals as to the order to be made by the House.

A second argument was afterwards ordered by one counsel on a side; when *Mr. Pepys* argued for the appellant, and *Sir E. Sugden* for the Respondents, in February, 1833.

The Lord Chancellor. — This case is one of *April, 1833.* considerable importance, both with regard to the amount of property in dispute, and in respect of the difficulties which arise, in any view that can be taken of the questions principally raised between the parties. These questions were argued twice before your Lordships; and, undoubtedly, it would be doing great injustice to the very able and learned counsel who discussed the question on both those occasions if I were not to remind your Lordships of the valuable assistance derived by this House from them.

It now comes before us for decision; and I am about to state (and I shall do it as succinctly as the nature of the case, which is spread over a considerable space, both in point of fact and law, will allow me,) the grounds upon which it is my intention to recommend to your Lordships mate-

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rially to vary, in some respects indeed to reverse, the decision of the court below.

In coming to the conclusion that I cannot agree in all respects with the very learned and distinguished Judges who pronounced this decision, more particularly his Honour the Vice-Chancellor, with whom I have the misfortune to differ most, it is a great consolation to me, not only that I have had the assistance, during the discussion of the question, of my noble and learned friend the Lord Chancellor of Ireland, but also that the grounds upon which it will be found that the differences exist are such as turn more upon the construction of an instrument which, taken in connection with the facts, must be admitted to be involved in great obscurity, and to be, perhaps, incapable of any construction in any respect consistent, than upon any matters of law.

Without further preface I shall remind your Lordships of the outline of this case, into the particulars of which it is not necessary, at present, to enter, in the observations which I am about to make.

Daniel Birkett the elder executed a bond upon the marriage of his niece, Sarah Jopson, with John Wienholt, who then became Mrs. Wienholt, and whom I shall therefore call, throughout these observations, Sarah Wienholt; and I wish for distinctness and also for shortness, when I speak of Daniel Birkett the younger, to be understood to mean the parties here representing Daniel Birkett the younger; and when I speak of Sarah Wienholt, to be understood to mean those who stand in the place and represent the interest of Sarah Wienholt. Mrs. Logan, the principal Ap-

pellant in this case, is the widow of Daniel Birkett the younger, who, after his death, married Mr. Logan. Daniel Birkett the elder made the bond upon which the question arose, conditioned for the payment of a sum of money by way of penalty. (Here the Lord Chancellor stated the condition as set forth, ante, p. 3. *et seq.*)

It is upon the construction of this instrument, and upon the rights of the parties, as arising out of and connected with the subsequent transactions, the will, and certain purchases of land, and certain transfers of stock, and certain assignments of securities; it is upon these matters that the questions arise, which are now to be disposed of by your Lordships.

Mr. Daniel Birkett the elder, after the execution of this bond, long after the marriage in question (having had, at that time, apparently, no children,) had a natural daughter, and she, in the year 1795, intermarried with Daniel Birkett the younger. Daniel Birkett the elder appears to have taken opinions as to the best means of defeating the bond which he had given, and he laid out considerable sums of money in the purchase of real estates, which were settled in various ways; but the bulk of them were settled upon himself for life, with remainder to Daniel Birkett the younger and Sarah his wife, now Sarah Logan. There were also transfers of stock, 27,000*l.* three per cents, and 20,000*l.* five per cents, into the name of Daniel Birkett the younger, and Sarah his wife; and upon the evidence there can be no doubt whatever, in any person's mind, that these transfers were made, that these purchases of land and conveyances of land were also made, for

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the purpose of defeating the provisions of the bond, and enabling him, Daniel Birkett the elder, to give to Sarah Birkett, now Sarah Logan, and to Daniel Birkett the younger (who was his nephew) a larger share than he was now disposed to give to Sarah Wienholt, or to those who represented her, if she were then dead, which, I believe, was the fact. He afterwards made his will, and bequeathed 2500*l.* (a bequest which it is not material now to consider) to Daniel Birkett the younger and Sarah his wife; and he bequeathed 3000*l.* to each of the daughters of Mary Wienholt: there were two daughters; he bequeathed 6000*l.* between the two, to be in satisfaction of the bond; he then gave a number of small legacies, and there is a general bequest of the residue to Daniel Birkett the younger. This will was dated, I think, in March, 1814, and in March, 1817, Daniel Birkett died—a date which is not immaterial as a circumstance in the case, if there could, on other grounds, remain any doubt with respect to the intention of those transfers. I think it was within ten days or a fortnight, or at least under a month from the time of this transaction, that Daniel Birkett the elder himself died; and not very long before, for I think it was in January, 1817, there was an assignment of a mortgage of 2000*l.*, in trust, to whomsoever Daniel Birkett should appoint, and in default of such appointment, to Sarah absolutely; and in that Daniel Birkett the younger appears, as far as I can see, to have no direct interest whatever. Then there was, in March, 1811, an assignment of a bond to the amount of 16,000*l.* to Daniel Birkett the younger; and upon the evidence here in the answers (I will not say upon all the answers

— certainly not upon the first — I can hardly say on the second answer, but upon the second and third answers taken together of Mrs. Logan); besides the other evidence in the cause, there can be no doubt whatever that that bond was assigned to Daniel Birkett the younger, and an agreement made, though it was not specified in the assignment, that Daniel Birkett the elder was to receive the interest upon the bond for his life; and he actually took a bond from Daniel Birkett the younger to pay him such interest.

The first question that arises here is upon the bond — shall it stand for an agreement, in consideration of marriage, or does it only give Sarah Wienholt her election either to take the legacy in the will or the penalty in the bond, and I have no doubt whatever that it is to be taken as an agreement, and must be performed as if it were a marriage article. Upon this part of the case, agreeing entirely, as I do, with the judgment of the court below, it is unnecessary that I should trouble your Lordships at any length; and I might simply refer to the case of *Chillenor* and *Chillenor* *, in which the principle laid down is applicable to this case, and the facts appear only to differ from those now before us, inasmuch as there seems to have been a separate agreement there of the two fathers to settle lands, and one of them did make a conveyance of the lands according to such agreement; and the other, instead of making a conveyance, gave a bond, with a penalty. Lord Hardwicke treats the case throughout his argument (and he appears to have gone fully and anxiously into the whole merits of the question) as if

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the condition of the bond contained an agreement, though he says the rest of the bond is evidence of a preceding agreement; but the whole of that case is strong and conclusive for the specific performance of the agreement, and against Sarah Wienholt being put to her election. This, then, would lead me to advise your Lordships entirely to concur with the first part of the original decree of my Lord Eldon, before whom the case originally came.

Having this point established, I shall lay down two principles as those which ought to guide our consideration of the question before us; *first*, that the rights of the parties arise under the bond considered as an agreement, binding the parties: and next, that the intent of the testator by his will, and in the disposition of his property, and, I may add, the various conveyances, and assignments, and transfers, in which he dealt with his property through its various channels, and in its various kinds, and the acts which he so did, are only to be suffered to affect the property so far as they are not repugnant to the agreement, and do not go against the rights given by that agreement, and to be only so far valid as between him and the parties in whose favour those acts were done or attempted to be done as they did not defraud or contravene that agreement. These principles are very general, and carry us a very little way towards a conclusion, or towards determining the questions which here occur; and, therefore, to these questions it is now my duty more particularly to direct the attention of your Lordships.

The first which may be said to arise is, upon the construction of that material part of the bond,

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the condition in respect of the property, the kind of property which is there specified or intended, as the subject-matter of the legacies, as well the legacies to be given to future legatees as life legacy to be given as the compensation for the legacy admitted to be given to Sarah Wienholt, which was to be measured by the greatest of the legacies that should be given to any other person. The words are: "I shall give and bequeath by my last will and testament or by some other ways or means, give and leave unto, or in trust for the said Sarah, or the issue of the said intended marriage, so much, in money or in valuable effects, as the said Daniel Birckett shall by such will or gift or bequeath to any one of his next of kin or nearest relations, or any other person or persons." The first question is, whether or not this extends beyond personality? It is contended on the one side, that it is general, and includes all property. It is contended, on the other side, that the second limit of the sentence is to be qualified by reference to the first, the first only stating money or valuable effects, and that being so qualified it is to be read as binding him to give to Sarah Wienholt so much, in money or in valuable effects, as he shall give by his will to his next of kin, or any other person, of money or of valuable effects. The party who were for the more extended construction contend that it means, that he should give to Sarah Wienholt so much, in money or valuable effects, as he should have given, in any way, to any other persons under his will. The expression is "person or persons;" but I dispose of that by a single remark, that it is perfectly manifest that persons to here must be taken to mean "person."

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It could not have been meant to give to Sarah Wienholt as much as he should give to any other persons; for that would be binding him to give her as much as he gave to all other persons whatever; that is, by no means, a plain manner of expressing such an intention; it appears to me, that it would be a strained and violent, and even, an absurd, construction, and, therefore, the phrase must be taken to mean any one person; and then it would stand thus—that he binds himself to give Sarah Wienholt, by his will, as much as he should give to any other person by his will; in a word, that is to put her on a footing with the person most benefited by his will, in a word, that she should have as great a share under his will as any one person should have under his will.

Upon this preliminary construction a question arises, whether he meant to give as great a share to her as he gave to any other person in personal property, or whether he binds himself to give her as much, generally, as he gave to any other persons in any way. The inclination of my opinion is in favour of the more limited construction. I think that the language of the bond rather applies to personality than to property generally. But in the view which I take of the case, I do not consider that the decision of this question is, of necessity, imposed upon your Lordships; the most material question for your Lordships to consider is raised by these dealings with his property, investing his personal estate in the purchase of real estate, and afterwards conveying that real estate with special reservation. That question, it appears to me, must be considered in this way. First, Does the instrument bind

Daniel Birkett the elder to give as much to Sarah Wienholt in real as well as personal estate (which I postpone for the present.) If this does not include real as well as personal estate, if the more limited construction of the words shall be adopted, the other question is, Has he got dealt with his personal estate in the purchasing of real estate, and conveying it afterwards, has he give Sarah Wienholt the right to have those purchases in the whole, or in part taken into account, in estimating her share? And this also includes the principle on which the other questions must be decided; at least, the main fundamental principle on which those questions must be decided, I mean the questions relating to the stock, to the bonds and to the mortgage.

Now, upon due consideration of the authorities and principles of law, I take the rule touching these matters to be this: If a person covenants or agrees, or in any manner validly binds himself to give to A. by his will as much as to any other, he may put it out of his power to do so by giving all in his lifetime; or if he binds himself to give A. as much as B. by his will, he may in his lifetime give B. what he pleases, so that his will shall give A. as much as his will gives B.; but then, the gifts which he makes in his lifetime to B. must be out and out; for, if to defraud or to defeat the obligation which he has entered into, he gives to B. any property real or personal over which he retains a control, or in which he reserves an interest to himself, then in order to protect the agreement or obligation which he has entered into, and to defeat the fraud attempted upon that obligation, and to prevent his escaping, as it were,

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from his own contract, this gift to B. shall be taken as testamentary, shall be taken as if included in the will, and the subject matter of it shall be brought back and made the fund out of which he shall perform the obligation; at all events it shall be made the measure for calculating and rendering the performance of, or dealing with the claim arising under that obligation.

The proposition which I have now stated appears to me to apply equally to all kinds of conveyances, whether by the sale of land to evade the requirements of an agreement, where the agreement requires give as much land to A. as B. shall have; or by purchase of land, where the object was to evade the agreement to give such an equal share of property; or by conveyance of land, either originally possessed or purchased afterwards; or by assignment of securities; or by the transfer of mortgages, or other personal chattels, provided those conveyances, assignments, or transfers were made fraudulent and not with a reservation on the part of the person making, and that those transfers, conveyances, and assignments, conferred not in all respects the real, but only in whole, or in part an apparent right to the property; and the distinction in all ways to be taken between the pretence, or the appearance, and the reality. Such contrivance in fraudulent cases under the bankrupt laws is treated, and dealt with as a badge of fraud, and must here, bearing the same tendency and effect, be subject to the same rule. The hand of equity will not be stayed by any such contrivances.

This view appears to comprize all the points of the case regarding the different kinds of property, and the different kinds of acts which were done in

respect of those kinds of property, subsequently to the bond being executed by Daniel Birkett the elder; and the two questions to which I am anxious to direct your Lordships' attention, are—first, to what property this proposition which I have ventured to lay down is applicable; and, secondly in what way it is to be applied to the different kinds of property, and the different kinds of transactions which are in question.

Before going into those two questions, I shall shortly refer your Lordships to the authorities upon which I think the general proposition laid down appear to stand incontrovertibly. The leading authority, from which the others may be said to spring, is the case decided in this House of *Jones v. Martin*.* The Lord Chancellor in advising the House to reverse the decree of the Court of Exchequer, there says, “the covenant did not prevent the father “from giving the stock out and out.” In that case, the father had made a covenant to give or leave by his will all his personal estate equally among his children; and it appears, that he had given the stock in a way somewhat similar to the gifts in the present case, in order to evade the obligation. His Lordship goes on to say, “the “covenant did not prevent the father from giving “the stock out and out; but, if he chose to keep it, “he kept it applicable to the general engagements “which he had entered into for his family. Lord “Cowper said, in the case of *Turner and Jennings*†, “that if the father were permitted to act according to the facts of that case, it would put an “end to the custom of London. He was a great

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* In a Note to the Report of *Randall and Willis*, 5 Ves. 262.

† 2 Vern. 612. 685.

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“ man, and to his lordship’s doctrine I declare my
 “ assent : so of a covenant as the present. Here
 “ also the property continued to answer all the
 “ father’s own purposes during his life. If a father
 “ will be partial and give a preference, he must
 “ give against himself, and not make a mere re-
 “ versionary gift. He should immediately feel
 “ himself so much the poorer for his gift ; if he is
 “ willing to suffer that, then let him yield to the
 “ impulse of his partiality. But if a father may
 “ effectuate his purpose by any thing short of this,
 “ it will furnish perpetual opportunity for subter-
 “ fuge and scheme to defeat and disappoint these
 “ covenants, which ought to be most honourably
 “ observed.”

· · In the case of *Randall and Willis* *, observations were made of a similar tendency. In *Lewin v. Madlock* †, Lord Eldon, referring to the case of *Jones v. Martin*, in which his Lordship appears to have been counsel, states the principle of it thus. He says — “ It is one of those loose cases
 “ of a covenant to leave to one child an equal share
 “ of the personal estate : and it was held by the
 “ House of Lords to mean only to leave the co-
 “ venantor fully at liberty to dispose providently
 “ or improvidently of his personal estate, such as it
 “ was or might be till his death ; provided he dis-
 “ posed of it absolutely as against himself, but if
 “ he did not strip himself absolutely of the interest
 “ in the property, he could not by reserving an
 “ interest for life, and giving to some one favourite
 “ child, defeat the covenant : that would be a fraud
 “ upon it : ” which is to the same effect, as far as it
 “ goes, with *Randall and Willis*. That was a question

* 5 Ves. 262.

† 8 Ves. 156.

as to the execution of a contract on marriage by bond, with condition to settle all the personal estate that the husband should at any time during the coverture be possessed of. And it was in that case held, that the party was not at liberty to lay out the money in the purchase of land for the purpose of evading the obligation of the contract. Another case, and the only other to which I shall refer your Lordships, is the case of *Fortescue v. Hennah**, in which it was decided that “a father, “under a covenant for an equal division at his “death of all the property he should die seised or “possessed of between his two daughters or their “families, though he retains the power of free “disposition by act in his life, cannot defeat the “covenant by a disposition in effect testamentary, “as by reserving to himself an interest for life.” That was a decision at the Rolls by Sir William Grant, who entered into the subject at some length, and referred, amongst other authorities, to that of *Jones v. Martin*, and he speaks thus — “Against “a diminution of his property, by absolute gift, “during his lifetime, his own interest and convenience form a pretty good security: not so, where “without any diminution of his own enjoyment he “exercises merely a posthumous bounty, though by “an irrevocable instrument. It seems to me that the “spirit of such a covenant requires that every disposition should be excluded which is in its effect “testamentary, though not such in point of form.” His Honour here lays down the principle to which I have adverted, that if in substance and effect the conveyance defeats or defrauds the obligation entered into, and is done with that object, having

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* 19 Vesey, 67.

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that tendency, producing that effect, though not in form testamentary, it is to be dealt with as if in fact it were testamentary, for the purpose of protecting the right, for the purpose of defeating the fraud, for the purpose of securing to the party under the agreement the right to that part of the estate to which he is entitled. This, then, would apply in the first place to all purchases and conveyances of land purchased after the time when the plan was laid for defeating the obligation of the bond, and which land or other real estate was purchased with such view, and not conveyed out and out to any person, but conveyed, reserving to Daniel Birkett the elder himself an interest in it, so as plainly to shew that he did not depart with the land from himself, and did not give it, according to the language of those cases, out and out, but only gave it after his own life in a certain event, keeping as much interest as he could to himself for his life. Such a transaction in all its stages is to be taken as part and parcel of a testamentary disposition. The proof is as strong as it can be of the intent; the taking the opinion of counsel expressly upon the question, how he could best defraud the covenant, and the whole evidence tend to the same point. The conveyance of one estate is to Daniel Birkett the elder for life, to the Defendant Sarah Logan; then the wife of Daniel Birkett the nephew, during her life; and after her decease to Daniel Birkett the nephew for life, in case he survived her; with remainder to such uses as the survivor of them should appoint; remainder to the right heirs of Daniel Birkett the elder in fee. There are other conveyances of the same description.

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Now, although there is in the decree no precise declaration on the subject of the real estate, yet there is a direction of Lord Eldon, which I think very plainly indicates that his opinion must have been according to the current of those authorities in favour of dealing with such conveyances as if they were in their nature testamentary with a view to the present case, and with a view of giving the benefit of them to Sarah Wienholt, in the estimation of what was taken by Daniel Birkett the younger of the property given, or whoever might be held to be the person most benefited by these proceedings. I think my Lord Eldon clearly must have had this opinion when he came to give the direction which I am about to read. He orders — “ That the Master shall enquire and state to the Court what purchases were made by the testator of real property after the execution of the said bond, of which the conveyances or assurances, and of what dates, were originally taken either to himself, or in trust for himself in fee, as to which by subsequent acts, assurances, or conveyances, and of what dates, he afterwards reduced himself to be tenant for life in law or equity, and with remainder or remainders to other person or persons, and to whom, and also what purchases of real property were made by the testator after the execution of the said bond, taking the conveyances or assurances thereof, and of what dates, to or in trust for himself for life with remainder or remainders over, and to whom. And it is ordered that all parties be at liberty to lay before the Master such evidence as he may think material, either by affidavit or interrogatories, or both, as he may think fit, for the information of

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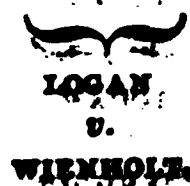
“the Court, *as to the intent* of the testator in each
“and every of the transactions of such purchases,
“conveyances, and assurances, and especially with
“reference to their proposed effect as to the oper-
“ation of the marriage bond.” I take it to be
quite clear that this is a direction which would not
have had any bearing upon the question, or which
would not have had any immediate connection with
the case, if Lord Eldon had not been of the opi-
nion to which I have adverted; and that Lord
Eldon, upon the whole, considered that these trans-
actions, these investments in real estates, and these
dealings with the estates so purchased, were to be
taken with a view to the present question as if they
were testamentary, so as to increase the share of
Daniel Birkett, supposing him to be the person most
benefitted, and to make the sums so invested avail-
able for the purpose of compensation to Sarah
Wienholt. The next question is, whether the principle is
applicable differently to the other transactions, and
to the other kinds of property dealt with by Daniel
Birkett; and the first that occurs in this view
is, a mortgage of 1523*l.*, the Tobago mortgage,
touching which there is something like evidence
attempted to be given that it was assigned to
Daniel Birkett the younger, in the year 1808,
and two sums of 365*l.* and 375*l.* are stated to
have been paid on account of it, which belonged
to Daniel Birkett the elder. I had some doubt
originally upon this, but upon the whole, con-
sidering the exceptions taken to the Master’s report,
I am inclined to agree with his honour the Vice-
Chancellor in overruling those exceptions. I think
that the evidence is not any thing like sufficient

evidence of the assignment of that mortgage, and such assignment must, therefore, be laid out of the account.

We then come to the bond of 16,000*l.*, which appears to have been assigned in March, 1811, to Daniel Birkett the younger, who gave his bond to his uncle, Daniel Birkett the elder, for the payment of the interest during his uncle's life; and the interest was in consequence paid to his uncle. That there was no consideration whatever for the assignment is also clear; and though there was no stipulation in the assignment itself that the interest was to be paid to the assignor, Daniel Birkett the elder, by his nephew for life, yet it is perfectly clear that this was the agreement upon which the assignment of the bond was made; and the best possible proof of it is, that he took from his nephew another bond to pay the interest. This assignment, therefore, comes distinctly within the principle which I set out with stating, and must be taken according to that principle, in the present case, to be testamentary. The 16,000*l.* therefore goes to increase by so much the share of Daniel Birkett the younger, and by so much to increase that fund by which I shall presently have to submit to your Lordships Sarah Wienholt was to be compensated.

We next come to a mortgage, for 20,000*l.*, which was assigned in January, 1817, in a different way: it was assigned, by Daniel Birkett, the mortgagee, to trustees upon trust, for such persons and uses as he the said Daniel Birkett should appoint, and in default of such appointment in trust for himself for life, and after his death to Sarah Birkett, his illegitimate daughter and niece by marriage, now Sarah Logan. There does not appear to me to have been

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any interest conveyed by that assignment to Daniel Birkett the younger.

The stock to which I have adverted forms the next of those items, which all come within the general description, except that the mortgage limited to Sarah Logan differs materially in excluding Daniel Birkett the younger entirely, and except that the 16,000*l.* bond also differs from the stock transaction, because it was given to Daniel Birkett the younger, we may say in reversion, expectant upon the death of the assignor, Daniel Birkett the elder, he reserving to himself a life interest. It seems to me in every respect testamentary. There is no interest whatever conveyed to Sarah Birkett the wife. The stock stands in a materially different way; it was transferred without any consideration except love and affection, and it was transferred into the joint names of Daniel Birkett the younger and Sarah his wife, and it is admitted in the answer that it was their intention to pay to the donor the dividends during his life. There was a power of attorney prepared to transfer to Daniel Birkett the younger and Sarah his wife, in which the intention of Daniel Birkett the elder is stated to have been, that the gift should endure to both, and therefore whoever survived the other would have the whole. The first thing to be remarked here is the suspicious date of the transaction. The donor died, I think, in March, 1817, and this stock was transferred on the 15th of February, 1817. Next is the evidence shewing the circumstances in which it was transferred, and the understanding and the admitted intention of the parties to whom it was transferred, to pay to the donor the dividends during his life. In these circumstances it comes precisely

within the same description as the bond for 16,000*l.*; it comes within the same description as the purchase and the conveyance of the land; it was for the purpose of defeating the obligation; it was not a departing out and out with his interest in that stock, but only giving it to those parties, the nephew and Sarah his daughter, they paying him the interest for his life; it was, as it were, an agreement between themselves, Daniel Birkett giving to the donees the principal sum, but reserving to himself a life interest in it.

The other particular that requires consideration is, the interest conveyed, whatever it was, reversionary I should say, reversionary expectant, upon the death of Daniel Birkett the elder. This interest was not given to Daniel Birkett the younger, alone, as the 16,000*l.* bond was; not to Sarah alone, as the 2000*l.* mortgage was assigned; but it was given to the two, jointly, with the benefit of survivorship; that is to say, both were to have it for their joint lives, and whoever survived the other was to take the whole; it is clear that was the intention. Suppose Daniel Birkett the elder had outlived Daniel Birkett the younger, Sarah, his wife, would have had the whole after Daniel Birkett the elder's death. Suppose Daniel Birkett, his nephew, had died, without reducing it into possession, then Sarah, his wife, would have had it. The decision as to this point rests upon treating this apparent transfer as being a transfer *inter vivos*; but it is a testamentary gift upon a contingency. It must, therefore, be considered with a view to the period of Daniel Birkett the elder's decease; and whatever rights Daniel Birkett the younger might then have, the difference must be

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noted between his having the gift to himself solely, or jointly with his wife, so that an accident or contingency might have prevented his taking the estate. But again, could he certainly have taken the whole if he had come into equity for it as a legacy? No: he would have been confined, as as I apprehend, to the interest which he had in it during his life, and he could only have obtained that interest, the interest of the money payable from half year to half year, during the life of his wife, and the principal only upon the death of his wife in his lifetime, to whom it was given jointly with him, with the benefit of survivorship; and even if, being executor as he was, he had proved the will, and tried to take possession, proceedings in equity being taken by the wife, or at least a next friend for her, might have prevented his obtaining more than the interest of the sum during his life, and the principal sum itself, by survivorship, if his wife should die before him: if she survived him, the whole principal sum would devolve to her. Taking the case as I am now assuming it, and upon the evidence, this appears to be the real effect of the transaction.

I might refer your Lordships to the cases in which these positions are more particularly illustrated; I mean *Richards v. Chambers**, and *Parker v. Brook*†. Upon these authorities it seems that Daniel Birkett the younger actually took what, in regard to this part of the property, as a testamentary gift, must be restricted to the value at the time of Daniel Birkett the elder's death, of his nephew's life interest, and of his contingent reversionary interest, that is, his interest in reversion expectant

* 10 Vesey, 580. See also *Lee v. Moggeridge*, 1 V. & B. 118.

† 9 Vesey, 588. See also *Rich v. Cockerell*, Id. 975.

upon Sarah's death. It is to be observed here, that although this point is left quite open in the original decree of 1825, yet his Honour, the Vice-Chancellor, in 1829, deals with it in a manner to raise considerable doubt of the consistency of the two parts of the declaration; for it is first declared, that the stock is to be taken as if it were given to Daniel Birkett the younger alone; and then this declaration is said to be without prejudice to any question as to this property between Daniel Birkett the younger, and Sarah Birkett, or as between their two estates. Now upon the very question between Daniel Birkett the younger and Sarah his wife as to the reversionary interest in those sums, the amount of benefit which Daniel Birkett the younger took, under the will or constructive will, must depend: for we are now speaking of this as a constructive bequest, and estimating what, in respect of that benefit, is to be the measure of Sarah Wienholt's claim, that is, the largest bequest made to any other person.

It is, from the form of the bond, quite open to argue, that the husband and wife, being separately objects of the testator's bounty, the circumstance of her having intermarried with him cannot be taken as consolidating their interest, and augmenting the husband's share, so as to increase the claim of Sarah Wienholt: she is to have as much as any other can take. The bond says "*persons*," but this must clearly be read "*person*," for the reason I have given. Then is not the condition of the bond satisfied if she takes as much as Daniel Birkett bequeathed to any one? Can it make any difference that he bequeaths to the two? Suppose the man mar-

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ried after the will was made, it can hardly be said, if they should intermarry before his death, so that the two legacies should coalesce, therefore the measure of Sarah Wienholt's claim should be increased so as to be equal to the sum of the two together. The right course then, as it seems to me, will be, to estimate the value at Daniel Birkett the elder's death, of the interest in those sums, and the gifts severally which Daniel Birkett the younger took, whether by gift, or conveyance, or assignment; and to give Sarah Wienholt one moiety of that sum, which amounts to the value of such interest.

I must here stop to mention, that I am assuming, all along, that Daniel Birkett the younger is the largest legatee; is the person most beneficially interested under the will, or, what is tantamount to the will, what may be called the constructive testamentary operation of the various transactions. I take that upon the view of the facts stated in the separate report to be perfectly clear, that he is the person interested most beneficially, or to the largest amount: I am assuming that he is interested to so much larger an amount than the legatee who approaches nearest to him in amount, as to be more than doubly interested beyond that next legatee; so that, at the period at which the estimate of his interest is to be taken, namely, the death of his uncle, the value of his interest being divided into two equal parts, one of those moieties is larger in amount, or, at all events, not less in amount, than the whole of what the next largest legatee takes under the same will, or disposition. If, unfortunately, it should be found in the course of the enquiries which will be directed, that

this is not the fact upon the principle upon which those enquiries will be directed to be made, and that any other person takes a larger amount than a moiety of the interest valued in the way and at the time to which I have already referred, then, undoubtedly, so far forth, a change must be made in the framing and construction of the order and the final decree; so that the person, whoever he may be, who shall be found to come as it were into the situation that I am now assuming Daniel Birkett the younger to stand in, namely, that one half of his interest is greater than the whole of the largest of the others, he must be substituted for Daniel Birkett, and then the whole will apply to that case: but it is most devoutly to be hoped that that will not be found to be the case, because it would completely frustrate all the expectations which one has of seeing a speedy end put to this protracted litigation; and it would be contrary to every probability which I can collect from a careful view of the facts and circumstances of the case. I think it must be taken substantially that there is no risk whatever of such a result, regard being had to this bond of 16,000*l.* and to the large interest of Daniel Birkett the younger in the lands purchased, and to the value, at the time of the decease of Daniel Birkett the elder, of his share in the stock, estimated on the principle to which I have already adverted with respect to those sums of stock. Taking all these things into account, there can be no doubt whatever that one moiety of what his interest at that period will be found to be worth will be greater than the whole of the largest legatee next to him.

I now propose to direct your Lordships' atten-

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tion to a part of the case which, in some respects, appears to me to be accompanied with great difficulty—I should say, with more difficulty than any other portion of the case, either the general principle of the construction or that which I have laid down as belonging to this particular case, to the instrument in question, and to the will and the state of facts among the parties interested; I allude to the question of the residue. In the first part of Lord Eldon's decree in 1825, I have already stated my entire concurrence; so with respect to the second part, which only directs enquiries, and does not decide as to the land, there can be no doubt whatever; but there is one word introduced into the third part of the decree which, to say the least of it, is calculated to raise great doubt upon the manner of dealing with it in estimating Sarah Wienholt's claim with respect to Daniel Birkett the younger, and which possibly may even go further than to raise a doubt, and may appear to sanction the more explicit declaration of his Honour the Vice-Chancellor; and as to which declaration it is that I differ much more widely, and hold an opinion much more confidently than I do upon the parts of the case to which I have already called your attention.

His Lordship there says, “Declare that it appears to this Court that, according to the true construction of the agreement contained in the said bond, the plaintiff and the defendant John Birkett Wienholt electing to take under the agreement contained in the condition of the said bond, and not to accept the 6000*l.* bequeathed by the will if they are more beneficially entitled under the said agreement, are entitled

“ to claim so much of the testator’s personal
 “ property, disposed of by his will, as will be
 “ equal in value to the largest amount of what is
 “ thereby bequeathed to any person or legatees.”
 If it had stopped at this point, there would have
 been no doubt; or even had it gone further, and
 said “ whether specific or pecuniary,” there would
 have been no objection; but the words “ or re-
 “ siduary legatee ” are added; and his Honour
 the Vice-Chancellor removes all doubt with re-
 spect to the import of these words, by declaring,
 “ That according to the true construction of the
 “ agreement contained in the condition of the said
 “ bond, testamentary dispositions of freehold, and
 “ copyhold, and leasehold estates, and dispositions,
 “ which, by the decree in this cause, are declared
 “ to be of the nature of testamentary dispositions,
 “ are within the intent and meaning of the said
 “ agreement:” and he declared “ that all the
 “ several freehold and copyhold estates purchased
 “ by the testator after the execution of the said
 “ bond and mentioned in the second schedule to
 “ the said separate report of the 13th of June,
 “ 1826, are to be considered in equity for the
 “ purpose of giving effect to the true intent and
 “ meaning of the said agreement, as if the said
 “ real estates had been given or devised by the
 “ said testator’s will; and it appearing that the late
 “ defendant, Daniel Birkett the younger, was the
 “ person to whom, by such testamentary dispo-
 “ sitions as aforesaid, or dispositions in the nature
 “ of testamentary dispositions, the largest benefit
 “ was given, the Court ordered that it be referred
 “ to the Master to whom this cause stands re-
 “ ferred, to compute what, at the time of the tes-

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“ tator’s death, would have been the amount and
 “ value of the benefits which the said Daniel
 “ Birkett the younger would have taken under
 “ such several dispositions as aforesaid, according
 “ to the declarations contained in the decree made
 “ on the hearing of this cause and in this order, if
 “ the said bond had not been made; and the
 “ Court declared that the plaintiff and the defend-
 “ ant, John Birkett Wienholt, were entitled to
 “ stand as specialty creditors upon the estate of
 “ the said testator, for a sum *equal to such amount*
 “ *and value*, with interest thereon, at four per
 “ cent. per annum, from the end of a year from
 “ the death of the testator.”

Now your Lordships perceive, that the consequence of these declarations, taking them both together, and making no exception as to the residue, would be merely this, that the decree would take in, and does, as it now stands, take in, beyond all doubt, the residue, as well as the legacies, and the gifts, conveyances, or assignments, and so forth, in the nature of legacies; and it makes, the whole together, the measure of Sarah Wienholt’s claim. Thus it adds to Daniel Birkett’s gift of 75,000*l.*, stock and money, taking it in round numbers, his legacy of 2500*l.*, and then, to that 77,500*l.*, it adds the residue, say 10,500*l.* in round numbers; and having thus obtained the sum of 88,000*l.*, it ascertains that to be Sarah Wienholt’s right under the agreement, and orders her to stand on the whole estate a specialty creditor for that sum, with interest, from March, 1818. In other words, no sooner is the residue, among other gifts and bequests, used for the purpose of the calculation, and for an instant,

as it were, appropriated to Daniel Birkett the younger, as part of his share under the will, than it is suddenly taken from him and given to Sarah Wienholt, as if the bond had been read or ought to be read, not that she should have a sum equal to the greatest bequest, or should have as much as he should give and bequeath by such will to any other his next of kin or others, but as if it were to be read "equal to the greatest intended bequest," or "so much as he should wish to give," or "so much as he should mean to give, or intend, or desire to give, or affected to bequeath, or would have bequeathed if he could," but for the bond. It is plain that, by the greatest bequest, must be understood to mean, the greatest effective bequest; and by so much as he should give or bequeath must be understood so much as he should so bequeath that the legatee might by possibility take: that Sarah Wienholt was to be, in plain words, as well off as any one of the objects of his bounty should really be by his will, not as he would wish any one to be: she was to be equal to the best of the legatees, but not to take as much in reality as any other proposed legatee would take apparently under an ineffectual bequest.


Another consequence would be, that in no conceivable way could he ever dispose of the residue to any one except Sarah Wienholt, if it exceeded the greatest single legacy; because, according to the decree, whoever took it would be the greatest legatee, and must give it all up immediately to Sarah Wienholt. It is used for the purpose of increasing the share of the residuary legatee as a measure of Sarah Wienholt's claim, and for that purpose it operates effectually and permanently; but as to the residuary legatee himself it only operates for an instant; for

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it is no sooner used for the purpose of calculation, to find out who is the largest, and to what amount he is the largest legatee, than it is instantly transferred over and given to Sarah Wienholt: it is more than taken away, as my noble friend reminds me—it is made a specialty debt upon the estate; and Sarah Wienholt, in respect of the residue thus momentarily given, or supposed to be given, for the purpose of calculation as it were, is to stand as a specialty creditor upon the estate, to the exclusion of all simple contract creditors; an effect, I believe, in the bequest of a residue, never before heard or thought of.

As to that part of the decree which orders Sarah Wienholt to stand as a specialty creditor, the most extravagant consequences are these: First, that in order to make her equal she is to take all, supposing that the residuary legatee has no other legacy; and next (which is a case that might very well happen), that the residuary legatee loses all, so as to make him, instead of being equal, which is the manifest intention and purpose of the instrument, the most unequal; and, lastly, that the person who was the principal object of the testator's bounty would lose the whole bounty, while the other would take the whole. This last consequence, however, is to be duly considered; since, according to the observations which I set out with, if you find it to follow necessarily from the agreement, and it is requisite to give the party her rights under that agreement, it signifies nothing at all that that conclusion would defeat the intention of the testator in his will. You must look at the intention so far only as it is consistent with and not repugnant to the agreement.

Now it may be safely asserted, that there is no instance of the intent of one of the parties to an agreement being so completely defeated as this construction would effect. If the land, stock, and bond, were out of the question, and if Daniel Birkett the younger only took the legacy of 2500*l.* besides the residue, then the equality, to secure which was the only object of the bond, and to secure which ought to be the principal object of your Lordships' judgment, could be easily attained by dividing the residue into two parts, one of which would be 2500*l.* more than the other; as if, for instance, the residue were 10,500*l.*, by giving Sarah Wienholt 6500*l.*, and Daniel Birkett the younger 4000*l.*, Daniel Birkett's legacy of 2500*l.* being added to that amount of the residue, would make Sarah Wienholt take exactly as much as Daniel Birkett the younger. But treating the stock and bond and lands as so much increase to his legacy, we have a much larger sum. It is needless to trouble your Lordships with the calculation of such portion of it as is equal to Daniel Birkett the younger's real interest in the estate at the time of his uncle's death. To make Sarah Wienholt's equal to his, she must take as much as he does. Then we ought, first of all, to ascertain what Daniel Birkett the younger takes, independent of the residuary gift, either directly under the will, that is, 2500*l.*, or by gift, or by conveyance declared to be in fraud of the agreement, and to be treated as testamentary. This includes the value, at Daniel Birkett's death, of Daniel Birkett the younger's interest in the 57,000*l.* stock transferred to him and his wife jointly, and the bond for 16,000*l.* assigned to Daniel Birkett alone; it also includes the value

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of his interest at that time in the estates purchased in fraud of the agreement. To an equal part of this amount Sarah Wienholt appears to me to be entitled. That amount, therefore, must be divided into equal parts, and each of them takes one moiety; that is, if the whole of Daniel Birkett the younger's interest in the land and the monies at the time of Daniel Birkett the elder's death, together with the pecuniary residue, or residuary property calculated at 10,500*l.*, or whatever it may be, were divided into two equal parts, we give each of the two parties, Daniel Birkett the younger and Sarah Wienholt, one of those parts. By Daniel Birkett the younger and Sarah Wienholt, I mean the parties claiming in the right of Daniel Birkett the younger and Sarah Wienholt; and this appears to me to be the only conceivable and consistent way of effecting the purpose of the agreement and the intention of the will, so far as the will is inconsistent with the obligation which the agreement meant to effect.

I take it, therefore, that it will be incumbent on your Lordships to make the alterations which I have suggested in the declaratory parts of the decrees of 1825 and 1829, by the Lord Chancellor and Vice-Chancellor. In the decree of 1825, only the word "residuary" ought to be struck out of the declaratory part of the decree, which word throws a doubt upon it, and possibly may have misled his Honour the Vice-Chancellor. It will also be necessary to make the alterations in that part of the decree in which the mortgage debt and bond and stock are mentioned, and those other alterations, which I have last adverted to; and the result of the whole will be, that first the

debts must be deducted out of the personal estate; that all the legacies must be deducted other than the 6000*l.*, which Sarah Wienholt, or those who represent her, elect not to take, having elected to proceed, as more beneficial to them, under the agreement; that in the calculation there ought to be deducted 2500*l.* legacy to Daniel Birkett the younger; that the estimate should be made (and directions given for that purpose, and declarations made to that effect) of the value of the interest in the stock and in the bond of Daniel Birkett the younger, at the death of his uncle; that such value, together with his interest in the estate of Daniel Birkett the elder conveyed to him Daniel Birkett the younger during his life, should be declared as testamentary, for the purpose of this agreement; that such interests and value should be added together, and that the whole sum should be divided into two, and one moiety given to those who claim under Daniel Birkett the younger, and the other moiety given to those who represent the interest of Sarah Wienholt.

It would be a great satisfaction to me, if, in looking further into the different parts of the Master's report, I should be able to discover (and I think I shall) that the Master has sufficiently reported to enable us to state finally in the order, without further enquiry, the parcels and the kinds of property which passed to each individual, and in what proportion; but it is very possible it may be necessary to send it back for further enquiries with respect to some of these matters. I hope, however, no doubt whatever will remain upon that which appears, according to his Honour's decree, to be past a doubt, that Daniel Birkett the younger is the largest

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legatee; and although his share will be diminished by the variations proposed in the decree, yet still there is sufficient, I apprehend, to bear out the finding, that Daniel Birkett the younger is the largest legatee, so as to avoid further inquiry.

Lord Plunkett. — In the decree proposed to be made by the noble Lord on the woolsack, he assumes that the half of the share which Daniel Birkett the younger will be entitled to will be equal to the greatest legacy, or not fall short of the greatest legacy or benefit given to any other person. If any doubt remains upon that part of the case, it may be necessary to have an inquiry directed for the purpose of ascertaining the fact; but as well as I recollect the course of the argument at the bar, the fact was not controverted. Therefore, in any thing which I say on the subject, I shall proceed on the assumption that the fact is admitted; and it appears to me that it would be proper to have a recital in the decree of that fact being so. If that should be drawn into controversy, it may be necessary to have inquiries about it; and in the result of those inquiries, if it appeared that any other person came into the situation of the greatest legatee, or if it appeared that any other person was in the situation of an equal legatee, it might lead to a different result as to the mode in which the funds were to be furnished for satisfying to the representatives of Sarah Wienholt that sum to which she is entitled. The first question which presents itself to your consideration is, What is the agreement that was entered into upon the marriage of Sarah Jopson

with John Wienholt? Upon that question I have nothing further to say, than that I entirely concur in the view that has been taken in both the decrees which have been pronounced — the decree of Lord Eldon, and the decree of the Vice-Chancellor; and in the opinion expressed by the noble Lord on the woolsack. It is not to be measured merely as a transaction governed and limited by the penalty of the bond, but it is to be taken as a marriage contract; and the agreement, which is recited in that bond as a marriage contract, is to be carried into execution by this Court. Your Lordships will observe, that it is not immaterial to the argument that this bill is filed, not upon any admitted legal right on which a party could proceed in a court of law; but it is founded on what is undoubtedly an equitable right to have a specific execution of the agreement implied in the bond, according to the true and just and reasonable construction of that agreement.

The next question is, Whether this being taken to be a marriage contract is applicable to personal estate only, or both to personal and real estates? If it were necessary to decide that question (I think in the result it does not become necessary), I should have no hesitation in saying, that it must be taken as an agreement applicable to personal estate only. Then the next question will be, Whether it being an agreement only relating to personal estate, the real estate is or not a security for the performance of that agreement? If it were necessary to decide that point, I should have no difficulty in saying also, (and so I take the decree of Lord Eldon to have gone the length of deciding as to that point,) that the real estate is to be con-

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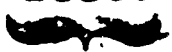
sidered as much a security for the performance of the agreement as the personal estate.

The next question is, What is the extent of the agreement, and what is to be the measure of the sum to be paid to the trustees for the use of Sarah Wienholt and her issue? In other words, What is the construction that this Court is bound to put upon the words which have been used in that part of the bond which contains the marriage contract? The terms are, that the uncle of Sarah Wienholt, Daniel Birkett the elder, binds himself to give so much as the said Daniel Birkett by his will shall give or bequeath to any person. Is the meaning of this, that he binds himself to give so much as by the words of his will, by the formal words of his will, supposing it had taken entire effect, any person would be entitled to? or is it so much as would be effectually given and substantially taken by such person? It is quite essential that you should decide, in the first instance, what is the meaning of this? Supposing Daniel Birkett the elder had by his will given to Daniel Birkett the younger an estate of the value of 10,000*l.* a year, and the gift of the estate could be considered in the construction put upon it as coming within the terms of the contract, and supposing his will did not effectually dispose of it, and it did not pass by his will, would the measure of bounty to Sarah Wienholt be that which he intended, or proposed to give, or would it be that which he substantially or actually gave? I conceive it must be the latter: to put any other construction upon the contract would, for the reasons which have been stated by the noble Lord on the woolsack, seem to be quite extravagant. No person in his senses could have intended to enter

And I may mention that the noble Lord on the woolsack

into any such contract as that; because it would be to say, that the measure of what Sarah Wienholt is to have is to be the greatest legacy, not which is given to any other person by the party entering into the contract, but which is professed to be given, although that party should not get it.

I cannot put any other meaning on this contract than this, that it is an undertaking by Daniel Birkett the elder, that no person deriving benefit under his will shall take a greater benefit than Sarah Wienholt shall be entitled to take. That is the true construction, as I understand it, of the contract between the parties. The other construction would absolutely defeat the purpose. What is contended for is this: that the legacy given to Daniel Birkett the younger, the disposition, either actually or constructively made testamentary, is to consist of the sums which have been transferred during the lifetime of Daniel Birkett the elder; it is to consist also of the entire sums professed to have been given to the nephew by the residuary clause, including all the landed property in which Daniel Birkett the younger took an interest, and also the landed property in which the reversion in fee had been limited to Daniel Birkett the younger, and which was disposed of by that residuary clause; all this is proposed to be taken into consideration as constituting the amount of the legacy given to Daniel Birkett the nephew; for what purpose? for the purpose of taking it away from him immediately; it is given to him not for the purpose of enjoyment, but it is given to him merely for the purpose of being a measure of that which is to be given to Sarah Wienholt, or those deriving under her. I, therefore, consider that the only rational conclusion at which your Lord-

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ships can arrive, is, to adopt the construction proposed by the noble Lord on the woolsack.

Then, in ascertaining what is the measure of benefit substantially given to Daniel Birkett the younger, there are only one or two points to which I shall shortly call your Lordships' attention. I quite concur in the opinion that Daniel Birkett the elder, after entering into this contract, was not at liberty, for the purpose of evading the contract, either to make any present disposition of his personal property, or to convert his personal property into real estate. The cases referred to by the noble Lord on the woolsack are not exactly the same, in circumstances, as the present; but the principle established by them furnishes precise grounds on which to proceed, in arriving at the proposed conclusion. It is perfectly true that this case does not resemble the cases cited in all the particulars. In this case it was quite competent for Daniel Birkett the elder to have disposed of the entire of his property by any gift in his lifetime. The case contemplated by the contract is the making a disposition by his will; and the provision is, that if he should make a disposition by his will, and give a larger sum to any one person than that which he gave to Sarah Wienholt, by will or in some other way, she should be entitled to compensation to that amount. The provision is against the disposition by will. If Daniel Birkett the elder had chosen to convert his entire personal property into real estate, and had left it to descend to his heir at law, no person could have found fault with it. The principle of the cases cited by the noble Lord applies to this case; for they go the length of establishing this rule, that if he makes a disposition in his lifetime of his personalty, or changes

his personalty by purchasing real estates, if that is done for the purpose of evading the performance of the special contract which he had entered into, and enabling him to make a disposition which is, in effect, a testamentary disposition, although it purports to be an act *inter vivos*, that shall not be allowed to be done, and shall be corrected by the established principles of the court. That being so, his reserving a life interest to himself in the personal property which he transfers, or his reserving to himself a life interest in the real estate which he buys, making that real estate the subject of disposition by virtue of the residuary clause in his will;—all this shall be evidence that it is fraudulently done, and for the purpose of defeating the contract which he had entered into.

This principle rests not merely upon the authority of the cases cited by the noble Lord, but it is to be inferred necessarily from the terms of the decretal order pronounced by Lord Eldon, because he evidently contemplated a case not only with respect to the transfer of the stock, but the real property; the possibility of a case in which the transfer of personal property into the purchase of real estates might be a fraud upon a contract of this description; and if it is possible that a case of that kind could exist, it appears to me that the evidence which has been adduced, and upon which the Vice-Chancellor has acted in the decree which he has pronounced, is most cogent and decisive on this subject. I therefore entirely concur in the opinion that, in estimating the value of what has been given by testamentary disposition to Daniel Birkett the nephew, you are to take into consideration the stock which has been transferred, and

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also the real estates which have been purchased, and which are the subject of the Master's report. In estimating that value there is only one particular point upon which I shall think it necessary to make an observation, and that is, with respect to the stock which has been transferred to Daniel Birkett the younger, and to his wife. If it rested merely upon the transfer of stock to Daniel Birkett the younger and his wife, I feel the great force of the argument used at the bar, — that it would be difficult to contend that Daniel Birkett the younger did not take the absolute interest in the stock, because there may be very great difficulty in saying that, if he chose to convert the stock (although upon the face of it the transfer was made for the benefit of his wife, in remainder, as well as for his own benefit), he could be restrained from doing so; but, for the reasons assigned by the noble Lord on the woolsack, the case assumes a totally different complexion. This does not rest upon an act *inter vivos*. The case of the Plaintiff rests upon this ground, — that the transfer is to be considered, not as an act *inter vivos*, but, being a fraud upon the contract, it must, for the purpose of giving effect to the contract, be considered as a testamentary disposition. When, therefore, in the contemplation of the Plaintiff in the cause, and in the contemplation of the learned Judge who pronounced this order, this is pronounced to be treated, not as a transfer of stock, but as a legacy; if it is to be so treated, no doubt can be entertained on the subject. If Daniel Birkett the younger had availed himself of the legal consequences of the disposition made by the transfer, or if, after the death of Daniel Birkett the elder, he had availed himself of

his legal character of executor of Daniel Birkett the elder, and chosen to go to the Bank, and desired to have the stock transferred into his own name, it is clear that, upon application to a court of equity, he would have been enjoined from demanding the stock, and the Bank would have been enjoined from transferring it to him, and the court of equity would have dealt with it as the case of a legacy; or, if he went into a court as a plaintiff, to claim the benefit of the legacy, it is quite impossible that he could have got decreed to him any thing more than that which he was entitled to receive,—the dividends upon the stock during the joint lives of himself and his wife, and that, in the event of his surviving his wife, he should be entitled to have the sum transferred to him; but, in the event of the wife surviving him, it would belong to her.

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Then this question becomes material only for the purpose of seeing what is the value of this particular stock, as an item in making up the estimate of the legacy which Daniel Birkett the younger is entitled to. That can be estimated only in this way:—It is very true that it is to be taken, not according to the event which happened, because the wife survived him, and became entitled to the whole; but it must be taken according to what was the value at the time of the death of the testator, and what was the value of the husband's interest in it during the joint lives of himself and his wife, and the value of the reversionary interest in the event of his surviving his wife. The conclusion is this, that, in calculating the value of Daniel Birkett's interest, you are to take the entire amount of the sums and the stock which were transferred

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to him, so far as he had an interest; and you are to take the entire amount of the bond assigned over to him, so far as he had an interest; and you are also to take the amount in value of the several estates which have been purchased, so far as he had an interest in them. Those estates are differently circumstanced: the limitations are different. In some of them he takes a life interest immediately upon the death of Daniel Birkett the elder; in others of them he takes a more remote interest; in others he takes an interest only under the residuary clause in the will of Daniel Birkett the elder; but in some of them an estate, with ultimate remainders in fee, was given to Daniel Birkett the elder, and those ultimate remainders in fee passed to Daniel Birkett the nephew, under the residuary clause in the will. All these sums being put together, and a value being put upon these several interests, whether immediate or reversionary, the whole amount of this will form the entire of the legacy which was given to Daniel Birkett the younger, which, by the terms of the decree, is considered as a testamentary disposition. Then the real object, the substance of the contract between the parties, is effected in this way, — that Daniel Birkett the younger shall not take, by virtue of these several bequests and devises, a greater benefit than Sarah Wienholt, or those deriving under her are entitled to take. That can be effected in no other way than that which is suggested by the noble and learned Lord, upon the woolsack; namely, you are first to consider what it is that Daniel Birkett the younger actually gets, not what he will professed to give him, for if he is disappointed in it, he does not get it; and then

you are to ascertain what is the entire amount of the legacy so computed; and then you are to divide that into equal portions, giving to him one moiety, and giving to Sarah Wienholt the other moiety. In that manner the contract is substantially and properly executed, because no person then gets a greater amount in value than Mrs. Wienholt. But yet I think it is necessary again to state that these views are founded upon the supposition that, dividing this legacy of Daniel Birkett the younger into equal parts, the moiety shall still give him the greatest legacy under the testamentary disposition. If that is not the fact, or if there is any doubt entertained upon the subject, or if the parties conceive any further enquiry is necessary, they are entitled to have that enquiry directed, unless it is clearly to be collected from the report of the Master that that fact is certified. I say it is necessary that that fact should be explicitly understood on all sides, because if it turns out that it is not so, it may make a difference not only as to the amount of compensation which Sarah Wienholt is to get, but as to the mode in which the payment of that sum is to be appropriated.

If Daniel Birkett the younger takes such an amount that one moiety exceeds the greatest legacy given to any other person, it is quite clear that justice is done, by taking from him the other moiety and giving it to Sarah Wienholt: if that is not so, a different consideration might arise. I think it is quite essential to have that sufficiently understood in the outset, whether this is to be inserted in the decretal order as an admitted fact in the case. I entirely agree both in the conclusion.

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to which the noble Lord on the woolsack has come, and with the grounds upon which he has arrived at that conclusion.

THIS HONOURABLE COURT OF LORDS, ASSEMBLED AT THE HOUSE OF LORDS, ON THE 4th DAY OF APRIL, 1833.

After hearing, &c.: the Lords spiritual and temporal in parliament assembled, find and declare, That the several voluntary dispositions of personal estate made by the testator in his lifetime, as mentioned in the first schedule to the Master's separate report of the 13th day of June, 1826, are to be considered in equity for the purpose of giving effect to the true intent and meaning of the agreement contained in the condition of the bond, in the pleadings mentioned, as having the same effect as if the personal estate so voluntarily disposed of had been *bequeathed by the testator's will* to the persons who, after his death, were intended to take the benefit of such dispositions; and that, in estimating the *value* of the *benefits* given to Daniel Birkett the younger, as herein-after mentioned, the Master is to consider what, at the time of the death of Daniel Birkett the elder, was the *value* of the *interest* of Daniel Birkett the younger in the sums of thirty-seven thousand pounds three per cent. annuities, and twenty thousand pounds navy five per cent. annuities, during the joint lives of him and his wife, and in respect of his contingent reversionary interest; and such sum is to be considered as a bequest to Daniel Birkett the younger. And the Master is also to add to that sum the bond for sixteen thousand pounds, in the pleadings mentioned, assigned to the said Daniel Birkett the younger in the year 1811." And the Lords further find

and declare, " That all the real estates which are
 " stated in the said separate report of Master Wil-
 " son of the 13th day of June, 1826, and the second
 " schedule thereto, as having been purchased after
 " the 5th day of April, 1804; and in which pur-
 " chases, or by any subsequent conveyance, Daniel
 " Birkett the elder retained any interest for his
 " life or in fee, and gave any interest to Daniel
 " Birkett the younger, ought for the purpose of
 " the said agreement to be considered as personal
 " estate, and as if made the subject of testamentary
 " disposition to Daniel Birkett the younger, and to
 " be dealt with as part of the residue in so far as
 " Daniel Birkett the younger's interest is con-
 " cerned. And it is ordered, that it be referred to
 " the Master to whom this cause stands referred, to
 " enquire into the particulars thereof, and of the
 " sums of money invested in such last-mentioned
 " purchases; and also to compute what, at the time
 " of the testator's death, was the amount and value
 " the benefits (other than any share of the residue)
 " GIVEN to the said Daniel Birkett the younger,
 " having regard to the declarations contained in
 " the decree made on the hearing of this cause,
 " and in this order; and the Master is also to en-
 " quire, whether or not the total amount of Daniel
 " Birkett the younger's share, calculated accord-
 " ing to the directions herein contained, at the tes-
 " tator's death, was greater than the share, calcu-
 " lated at the testator's death, of any other person
 " benefited by Daniel Birkett's will, or by gifts or
 " conveyances made to such other persons, but
 " in which the testator Daniel Birkett the elder
 " retained an interest. And it is further declared,


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“ that the plaintiff is entitled to a sum equal to the
“ amount of the greatest sum taken by any legatee,
“ either under any actual bequest, or under any
“ disposition herein directed to be considered as a
“ bequest; and that if Daniel Birkett the younger
“ has such greater share, the plaintiff’s demand is
“ for an equal share to his. And it is further de-
“ clared, that the demand of the plaintiff is a debt
“ by specialty, and as such entitled to priority over
“ both the simple contract debts and the legacies,
“ whether residuary or otherwise, and that the
“ whole of the property disposed of by the will
“ under the description of residue is applicable to
“ discharge such debt to the plaintiff; and if that
“ fund shall not be sufficient, then that the shares
“ of Daniel Birkett the younger, and Sarah his
“ wife, are liable for satisfaction of the plaintiff’s
“ claim to abate in proportion to the amount of the
“ benefits taken by them under the will, or by con-
“ veyance or gifts, in which Daniel Birkett the
“ elder retained any interest during his life. And
“ it is further declared, that all the clear residue,
“ after making satisfaction to the plaintiff as herein
“ directed, and after making the calculations and
“ taking accounts as directed, is divisible equally
“ between Daniel Birkett the younger’s personal
“ representatives and the plaintiff. And it is or-
“ dered and adjudged, that so much of the said de-
“ cree as overrules the exceptions be, and the same
“ is hereby affirmed; but if it shall be found that,
“ after making the calculations directed, any other
“ person takes under the will, or by conveyance or
“ gifts, from the testator, in which he retained any
“ interest during his life, a larger share than the
“ plaintiff shall have by the directions herein given,

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“ then and in such case it is ordered, that no dis-
“ tribution is to be made until the further direc-
“ tions of the Court shall have been obtained. And
“ it is further ordered, that the said cause be re-
“ mitted to the said Court of Chancery, to proceed
“ therein as shall be just and consistent with this
“ judgment.”

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(COURT OF CHANCERY.)

CAROLINE ROBLEY, Widow, WIL-
 LIAM BLAKE, and JAMES CUN-
 NINGHAM - - - } *Appellants ;*

CHARLES BROOKE - - - *Respondent.*

WILLIAM BLAKE and others - - *Appellants ;*

And the said CHARLES BROOKE - *Respondent.*

By articles of partnership made, in 1802, between R. and A., it was agreed that a mercantile house should be established, and carried on for the sale of West India produce on commission, and the supply of stores to planters, &c. ; that R. should be interested for profit and loss in three-fourths, and A. in one-fourth ; and that the partnership should not advance money on loan to any person without the previous particular consent of all the partners.

B. was privy to this deed ; and, by other articles of even date, it was agreed that B. should be a partner in the concern, under R., and should be interested for one-fourth, to be deducted out of the share of R. ; and it was provided, in case of the death of A., that his share should be divided so as to give to R. two-thirds and to B. one-third of the whole business.

By a deed executed in March, 1804, it was agreed that the partnership should be dissolved as to A., and, in consideration of his retiring, that R. and B. should pay for his use 2,668*l.* and 2,500*l.*, for which acceptances of the firm had been given, and that all the property of the partnership should become the absolute property of R. and B. ; and, accordingly, the partnership property was by the deed assigned to R. and B. generally, without specification as to the proportion of their shares and interests in the property so assigned. The bills accepted by the firm, as the consideration for this assign-

ment, were afterwards paid out of the funds of the continuing partnership.

By a deed executed in June, 1804, to which R. and B. were parties, a debt of 94,511*l.* 1*s.* 6*d.*, secured by mortgage upon a West India estate, was purchased by, and, with the securities, assigned to, R. and B., in consideration of a sum of 69,511*l.* 1*s.* 6*d.* By another deed, of even date, reciting that the purchase money was to be paid by bills which had been drawn upon the firm of R. and B. by the assignor of the mortgage, the estate was charged with the payment of the bills, and R. and B. also covenanted to provide for the bills when due.

After this purchase, various deeds were executed by the mortgagor, giving further interests to the firm of R. and B. in the estate upon which the mortgage money was secured, and other plantations. The consignments from these plantations were made to the firm of R. and B., and the transactions relating to the mortgage were entered in the partnership books without any remark.

In 1814, in a deed by which R. for himself and as attorney for B. granted an annuity charged upon one of the estates called H., it was recited that the plantation had vested in R., in trust for himself and B., as tenants in common in fee simple. But the bills of costs for business done in respect of the mortgage transactions were charged against the firm, were so entered in the partnership books, and were paid out of the joint funds.

R. died in 1821.

In March, 1823, B. filed a bill against the personal representatives of R., stating that he and R., as partners, became mortgagees, and afterwards owners, of the estates before mentioned; and that as to the plantation H., it was purchased with funds supplied by him (B.), on account of the partnership; and that it was always treated as the property of the partnership. This suit was not prosecuted; but, in May, 1823, a bill against B. was filed by the representatives of R., and in 1827, a cross bill by B., raising the question as to the share of B.; and it was held upon appeal, reversing the decree of the court below, that B. was not intitled to a moiety of the funds upon the mortgage transactions, and the retirement of A., but to the same share and proportion as under the provisions of the original articles of partnership.

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BY articles of partnership, bearing date the 29th of November, 1802, entered into and executed between and by John Robley of the first part, John Proctor Anderdon of the second part, and Thomas Oliver Anderdon of the third part, it was covenanted and agreed that John Robley and Thomas Oliver Anderdon should forthwith proceed to Dunkirk to establish a mercantile house for the sale of West India produce, on commission, and the supply of stores to West India planters and others, and for such other business as from time to time might be agreed upon, and should be carried on in partnership by John Robley and Thomas Oliver Anderdon, from the 1st of October then last, for nine years, to be computed from the 30th of April then next; and it was thereby further agreed that John Robley should be interested in the business as to profit and loss for three fourth parts thereof; and Thomas Oliver Anderdon in the remaining fourth part; and that the business should be managed and conducted under the direction of John Robley, who for that purpose should reside at Dunkirk; and it was provided that John Robley should be allowed, out of the partnership business, the sum of 500*l.* annually, for entertaining the friends and correspondents of the house, and should also be allowed thereout the rent and taxes of a convenient dwelling-house, and the rent of a proper counting-house, and his travelling expenses. And it was thereby declared and agreed, that the partnership thereby agreed upon should not make any advances of money or loans other than the payment for insurances, freights, duties, charges, and supply of

stores in the ordinary course of current business, to any person or persons whomsoever, or become security for them for the purpose of procuring consignments, or any other purpose whatsoever, without the previous particular consent of all the partners; and that at, or as soon as might be after the expiration or other sooner determination of the partnership term thereby agreed upon, a full and final account of all the debts, credits, property, and effects of and belonging to the business should be made up and settled, &c.; and after payment and discharge of debts, and all charges, &c., all the residue of the partnership property and effects should be divided between the partners from time to time, as fast as the same should be got in, *pro rata* according to their respective shares in the capital.

Upon the articles of copartnership a memorandum was indorsed, by which the Respondent acknowledged that he was privy to the deed, and that it was made and executed with his previous consent and approbation.

By other articles, of even date, made and executed by and between John Robley of the first part, the Respondent of the second part, and John Proctor Anderdon and Thomas Oliver Anderdon of the third part, after reciting the last-mentioned articles, John Robley, for himself, his heirs, executors, and administrators, and the Respondent for himself, his heirs, executors, and administrators, with the privity, consent, and approbation of John Proctor Anderdon and Thomas Oliver Anderdon respectively, and Thomas Oliver Anderdon, as far as he lawfully could bind himself during his minority, for himself, his heirs, executors, and administrators, re-

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spectively covenanted with each other that the Respondent should be a partner in the business, under John Robley, and should be interested therein as to profit and loss thereof, as and for one fourth part of the whole profit and loss of the business, to be deducted out of such share as in and by the first-mentioned articles of agreement was provided to belong to John Robley; and that the Respondent should bring in 10,000*l.* as part of the capital by the first-mentioned articles agreed to be brought in by John Robley; and that the Respondent should be allowed interest thereon, at the rate in the first-mentioned articles mentioned as to interest on capital, and should observe, keep, perform, and be bound by all the clauses and agreements in the first-mentioned articles contained; and that the other parties thereto, and their respective executors and administrators, should and would observe, perform, and keep towards the Respondent and his executors and administrators, all the same articles, provisoes, and agreements in like manner as if the Respondent had been a party thereto, and had executed the same: Provided, and it is thereby declared, that nothing in the first-mentioned articles contained should oblige the Respondent to reside at Dunkirk, or at any other place where the business should be carried on, or to take any part in the management thereof; and that the Respondent should be at liberty to carry on and continue, either by himself or in partnership with others, for his own use and benefit, all such trade, business, commerce, and underwriting, in which he was engaged previous to the execution of the articles. It was also provided, in case of the death of Thomas, Oliver

Anderdon, that his share should be divided so as to give John Robley two thirds and Charles Brooke one third of the whole business.

The partnership business was accordingly established at Dunkirk, and several ships were freighted on account of the partnership business, which arrived at Tobago; but shortly afterwards, the war between Great Britain and France being renewed, the ships and cargo, with the island, were captured by the British forces, and a part of such cargoes was condemned as lawful prize.

The Island of Tobago having become a part of the British West India possessions, it was no longer possible to keep up the establishment at Dunkirk, and the same was accordingly removed to London in July, 1803.

On the 13th of December, 1803, John Robley wrote to the Respondent a letter, to the purport and effect following: —

“ Dear Sir, — As I cannot consider that the
 “ partnership of John Robley and Co. was ever
 “ designed to be carried on in London, or that it
 “ was ever in the contemplation of any of the
 “ parties (but most expressly the contrary) that it
 “ should be carried on elsewhere than in the re-
 “ public of France; I beg leave to state most dis-
 “ tinctly, that I wish to have the affairs and
 “ accounts of the business of John Robley and
 “ Co. immediately wound up and finally terminated
 “ without further delay. The establishment and
 “ partnership was formed to carry on business in
 “ the republic of France, upon the basis of Tobago
 “ connections: the event of the war has destroyed
 “ the possibility of carrying that design into ex-

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“ ecution ; the consignments which would have
“ been made to the house of John Robley and Co.
“ naturally revert to their former channel, and
“ the firm of John Robley and Co., at Dunkirk,
“ being left without the possibility of conducting
“ any business, I conceive that nothing remains
“ but finally to acknowledge and mutually the
“ dissolution of the partnership, which has already
“ naturally expired.”

By an indenture bearing date the 10th of March, 1804, made and executed by and between John Robley of the first part, the Respondent of the second part, and John Proctor Anderdon of the third part ; after reciting the two several articles of agreement, bearing date respectively the 29th of November, 1802 ; and that it had been agreed that the partnership so constituted and formed in and by the said articles, and partnership trade carried on in pursuance thereof, should, as to Thomas Oliver Anderdon only, be dissolved and determined from the day of the date thereof ; and that Thomas Oliver Anderdon should retire and be no longer a partner ; and that in consideration of his so retiring, John Robley and the Respondent should, at the time and in manner therein mentioned, pay to John Proctor Anderdon, on the behalf and for the use of Thomas Oliver Anderdon, the two several sums of 2668*l.* 12*s.* 5*d.* and 2500*l.* therein mentioned ; and that all the property and outstanding debts and effects of the partnership should become the absolute property of John Robley and the Respondent, and be recovered, received, and managed by them for their own use ; and that John Robley and the Respondent should indemnify John Proctor Anderdon and Thomas Oliver Anderdon, their and each of

their heirs, executors, and administrators, from and against all debts, sums of money, claims, and demands whatsoever affecting the partnership or any of the parties thereto in respect thereof; and that John Proctor Anderdon, on behalf of himself, and Thomas Oliver Anderdon his son, should release, assign, and transfer unto John Robley and the Respondent, all the share, right, and interest of them, John Proctor Anderdon and Thomas Oliver Anderdon, in respect of the partnership trade, and the debts, property, and effects thereof; and also reciting that two acceptances of the firm of John Robley and Co. had been given to John Proctor Anderdon, for the sums of 2668*l.* 12*s.* 5*d.* and 2500*l.*, payable respectively on the 30th of April, and the first of October, 1804: it was witnessed that the parties thereto did mutually covenant and agree that the partnership, and the term created by the articles of agreement should be thenceforth dissolved and determined, so far as respected Thomas Oliver Anderdon and John Proctor Anderdon, in regard to the covenants, stipulations, and agreements in the articles contained on his part; and that all the goods, chattels, debts, effects, rights, claims, and demands whatsoever of the partnership should, from thenceforth, become and be the absolute property, and wholly at the risk of John Robley and the Respondent, their heirs, executors, and administrators, and should be recovered and received by them for their own proper use and benefit; and it was, by the indenture now in recital, further witnessed, that John Robley and the Respondent did thereby for themselves jointly, and each of them did for himself severally, and for his own heirs, executors,

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and administrators, covenant and agree with John Proctor Anderdon, his heirs, executors, and administrators, that they, the said John Robley and the Respondent, or one of them, their or one of their heirs, executors, or administrators, should or would at their, or some or one of their own costs and charges, from time to time, and at all times thereafter, save, defend, keep harmless and indemnify John Proctor Anderdon and Thomas Oliver Anderdon, their heirs, executors, and administrators, goods and chattels, lands and tenements, estate and effects, of, from, and against all sums of money, debts, claims, and demands, due and owing from the said partnership, and from all actions and suits relating thereto. And it was further witnessed, that in consideration of the covenant therein-before contained on the part of John Robley and the Respondent, John Proctor Anderdon did assign, transfer, and release unto John Robley and the Respondent, their executors, administrators, and assigns, all the part, share, and proportion, right and interest, of him Thomas Oliver Anderdon, of, in, and to the partnership trade, and the capital, stock, debts, sums of money, bonds, bills, notes, and all other property thereto belonging ; and all the right, title, claim, and demand, both at law and in equity, of them John Proctor Anderdon and Thomas Oliver Anderdon, and each of them, their and each of their heirs, executors, and administrators, into, or in respect of the premises thereby assigned ; to have, receive, and take the part, share, and proportion, and all and singular other the premises mentioned to be thereby assigned and released unto and for the only use and behoof of the said John Robley and

the Respondent, their executors, administrators, and assigns : Provided, and it was agreed that the agreement for the said Thomas Oliver Anderdon's retiring from the said business, the indenture now in recital, or any thing therein contained should in nowise prejudice or affect any question between the said John Robley and the Respondent relating to the partnership, or the secondly therein-before recited articles of agreement of the 29th of November, 1802; or in any way relating to the premises.

The Respondent and John Robley paid to John Proctor Anderdon, on behalf of Thomas Oliver Anderdon, the amount of the two acceptances for the sums of 2668*l.* 12*s.* 5*d.* and 2500*l.*, at the respective times at which the acceptances became due; and John Robley and the Respondent continued to carry on the business at London, under the firm of John Robley and Co.

By indentures of lease and assignment, and release, bearing date respectively the 29th and 30th days of June, 1804, and executed by the several parties thereto, the release being made between Alexander Donaldson of the first part, George Glenney of the second part, John Robley and the Respondent of the third part, Ambrose Weston and James Weston of the fourth part, Thomas Fleming of the fifth part, and William Walton of the sixth part, after reciting the agreement for the purchase of a mortgage debt of the amount of 94,511*l.* 1*s.* 6*d.*, which was due to Alexander Donaldson, and secured by mortgage upon estates of Sir William Young in the West Indies, it was witnessed, that in consideration of the sum of 69,511*l.* 1*s.* 6*d.* to Alexander Donaldson, paid by

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John Robley and the Respondent, Alexander Donaldson bargained, sold, assigned, transferred, and set over unto John Robley and the Respondent, their executors, administrators, and assigns, the sum of 94,511*l.* 1*s.* 6*d.* so due and owing from Sir William Young, upon the several thereinbefore recited indentures of mortgage, together with all bonds, powers, and remedies in respect of the same, to hold, receive, and take the same, unto John Robley and the Respondent, their executors, administrators, and assigns, as and for their own proper monies, goods, chattels, and effects absolutely; and it was thereby further witnessed, that George Glenney, as touching certain parts of the plantations and estates, bargained, sold, aliened, released, and confirmed, and Alexander Donaldson, as touching his estate and interest in all the plantations, negroes, hereditaments, and premises, bargained, sold, assigned, ratified, and confirmed unto John Robley and the Respondent, and to their heirs, executors, administrators and assigns, the several plantations called Old Road, in the island of Antigua, and Calliaqua, and Pembroke, in the island of St. Vincent, with the negroes, slaves, and appurtenances thereunto belonging, to hold the same, so far as regarded the real estate, unto John Robley and the Respondent, their heirs and assigns, for ever, subject to such equity of redemption as then subsisted therein, and to hold the same, so far as related to the personal estate, to John Robley and the Respondent, their heirs, executors, administrators, and assigns, as and for their own goods and chattels absolutely.

By an indenture bearing even date with the last-mentioned indenture, and made between John

Robley and the Respondent of the one part, and Alexander Donaldson of the other part; after reciting that the purchase-money of 69,511*l.* 1*s.* 6*d.* had not in fact been paid, but that bills were to be drawn by Alexander Donaldson, on and accepted by John Robley and the Respondent, under their trading firm of John Robley and Company; and also reciting that such bills so drawn on and accepted by John Robley and the Respondent had been accordingly given; it was witnessed, that John Robley and the Respondent for themselves and himself, and their and each of their heirs, executors, and administrators, did thereby charge the plantations, estates, slaves, and other property released and conveyed by the last-mentioned indentures, with the due and punctual payment of the said bills: and in the said indenture is contained a covenant from John Robley and the Respondent, for themselves and himself, their and each of their heirs, executors, administrators, and assigns, to pay and provide for the said bills when due.

After the assignment, it was agreed between John Robley and the Respondent, and Sir William Young, that the produce of the estates should be consigned to John Robley and Co., and an entry of the mortgage was made in the waste book, and an account opened in the ledger, by John Robley.

In May, 1805, a profit was realised on the purchase of the mortgage, but not carried to the profit and loss account of the partnership.

The profit and interest on the mortgage was not comprised in the head "Sundries," in the account; but the profits on the consignments, &c. from the estates were comprised under the word Sundries.

By an indenture, bearing date on the 2d day of

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July, 1804, which was executed by the several parties thereto, and made between Sir William Young of the one part, and John Robley and the Respondent of the other part, it was witnessed, that for the raising and securing as well the said sum of 94,511*l.* 1*s.* 6*d.* as also all such further sums of money as the said John Robley and the Respondent, or either of them, had or should pay or advance for the use and on the account of Sir William Young, his heirs, executors, or administrators, Sir William Young confirmed the transfer, release, and assignment, so made to John Robley and the Respondent, and Sir William Young subjected and charged all the plantations, negroes, and lands in the several islands of Antigua and St. Vincent, with the payment to John Robley and the Respondent, their executors, administrators, and assigns, not only of the mortgage debt of 94,511*l.* 1*s.* 6*d.*, but also with all such other sums of money as John Robley and the Respondent, &c. should pay or advance to, or on account of Sir William Young, his heirs, executors, administrators, or assigns, with interest at six per cent. per annum; and in the indenture now in recital is contained a covenant by Sir William Young, that all the produce of the plantations should be annually made to John Robley and the Respondent, until the whole of the mortgage debt and interest should be paid off and satisfied.

By indentures of lease and release, bearing date respectively the 30th and 31st days of July, 1804, made and executed between Sir William Young of the one part, and John Robley of the other part, it was witnessed, that in consideration of 10,000*l.* therein expressed to be paid by John Robley to

Sir William Young, he granted, &c. to John Robley, his heirs, executors, administrators, and assigns, all that plantation called Betsey's Hope, in the island of Tobago, with the negroes, slaves, chattels, hereditaments, and premises thereunto belonging, to hold the same unto and to the use of John Robley, his heirs, executors, administrators, and assigns, subject to a mortgage to James Ramsay Cuthbert, and subject to the usual proviso for redemption.

By another indenture, bearing date the 31st of July, 1804, and made between Sir William Young of the one part, and John Robley and the Respondent of the other part, it was mutually declared and agreed that the 10,000*l.* was not in fact advanced, and that the indenture of even date was meant as a security to John Robley and the Respondent, and that the plantation, estates, and premises situate in the island of Tobago, and thereby released and assigned, were to be a security and be redeemed only upon payment by Sir William Young to John Robley and the Respondent, of all debts, sums of money, and interest, which he then owed or should thereafter owe to them or either of them, either in their joint characters or separately, with any other person or persons, or to their executors, administrators, or assigns, or their survivors in trade, or which they or any of them were then or might thereafter be engaged or liable to pay at the request or on the account of Sir William Young, or which might be paid by them, or any of them for the cultivation and support of the plantations and estates, together with all interest, commission, and charges due to them or any of them.

By indentures of lease and release bearing date respectively the 10th and 11th of September, 1804,

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made and executed between Sir William Young of the one part, and John Robley of the other part, it was witnessed, that for securing to John Robley, his executors, administrators, and assigns, as well the payment of the sum of 94,511*l.* 1*s.* 6*d.* with interest, as also the repayment of all such sums of money as he then had, or might thereafter pay, lend, or become liable to, for the use of Sir William Young, or as he then did or should thereafter owe John Robley for commission, or on any account, Sir William Young granted, &c. unto John Robley, all that plantation called Betsey's Hope estate, situate in the said Island of Tobago, with the slaves, chattels, and appurtenances thereto belonging; and also all other plantations, hereditaments, slaves, and chattels of Sir William Young, situate in the Island of Tobago, to hold the same unto and to the use of John Robley, his heirs, executors, administrators, and assigns, charged nevertheless with the mortgage to James Ramsay Cuthbert, and the mortgage for securing 10,000*l.* and interest, and subject to the usual proviso for redemption.

By an indenture, bearing date the 11th day of September, 1804, made between Sir William Young of the one part, and John Robley and the Respondent of the other part, after reciting the last-mentioned indentures, it was mutually agreed and declared by and between the parties, that the name of John Robley was made use of in the said indentures respectively, in trust for the joint use of himself and the Respondent; and that the said indentures were so given and executed by Sir William Young to John Robley, and were intended as security to John Robley and the Respondent,

their executors, administrators, and assigns, partners and successors in business. This indenture was not executed by the Respondent.

In January, 1808, John Robley went to Tobago, leaving to the Respondent the management of the partnership business during his absence.

By articles of agreement dated the 23d day of July, 1808, made and executed between and by Sir William Young of the one part, and John Robley of the other part, Sir William Young, in consideration of the sum of 45,000*l.*, agreed to grant, &c. unto John Robley, his heirs, executors, and administrators, all his right, title, and interest, including his equity of redemption on the plantation called Betsey's Hope, with the negroes, &c. so as to vest the fee simple and inheritance of the same in John Robley, his heirs and assigns, free from incumbrances, except a mortgage of 4000*l.* due to the said James Ramsay Cuthbert; and it was among other things agreed that after deducting the various sums in the articles specified, and the amount due to John Robley and Co., according to the last account agreed and signed from the 45,000*l.* sterling, Sir William Young should have credit on his general account with John Robley and Co. for such balance as should be due after the deductions.

These articles of agreement were prepared and executed in Tobago, under the direction of John Robley, and were not executed by the Respondent. The estate comprised in the agreement was afterwards by a deed dated the 22d of December, 1808, conveyed to John Robley.

In 1809, John Robley on behalf of himself and the Respondent, became purchaser of the equity of

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redemption of the estates of Pembroke and Calliaqua, under a sale made by the Provost Marshall.

In the year 1814, an indenture prepared in the Island of Tobago, by or under the direction of John Robley, was executed by John Robley in his own name, and as attorney for the Respondent, whereby they granted to Portia Young, one of the sisters of Sir William Young, an annuity of 200*l.* in which indenture is contained the following recital: “ And whereas by virtue of several conveyances and assurances in the law duly recorded in the register’s office in the Island of Tobago, the same plantation (meaning Betsey’s Hope), slaves and hereditaments, have, since the decease of the said Sir William Young, become and now are vested in the said John Robley, in trust for himself and the said Charles Brooke as tenants in common in fee simple.”

John Robley died in 1821, and the Appellants were parties taking an interest, or trustees appointed by the will. The bills of costs of the solicitors employed on the part of John Robley and the Respondent for preparing the deeds and for business done in respect of the transactions and matters aforesaid, were made out by those solicitors as against the firm of John Robley and Co. In those bills of costs the business therein charged for was treated as business done for the firm; and the amounts of those bills of costs were entered in the partnership books to the credit of the solicitors, as between them and the firm, and were paid out of the partnership monies; and the amounts of those bills of costs, so far as they related to transactions with Sir William Young, were entered


in the partnership books to his debit as between him and the firm.

After the completion of the transactions of 1804, with respect to Sir William Young's estates, a book was prepared by the then solicitor of the firm, for the convenience of the partners, containing full copies of all the before mentioned deeds, down to, and including the deed of declaration of trust of the 11th of September, 1804. In October, 1807, when John Robley was about to proceed to the West Indies, it being desirable that he should take that book with him, a duplicate was prepared by the then solicitor of the firm, for the purpose of being left with the Respondent in England for his convenience, and remained in the possession of the Respondent from that time.

In this book, for the purpose of more convenient reference, by the side of the copy of each deed therein contained, there was a marginal abstract, or epitome, of the several clauses of the deed: the body of the deed mentions John Robley and Charles Brooke, the corresponding marginal abstract, or epitome, has "J. Robley and Co."

In March, 1823, the Respondent filed a Bill of Complaint in the Court of Chancery, in England, against Henry Smith and the Appellant William Blake, as the personal representatives of John Robley (pending a suit in the Ecclesiastical Court), praying an account of the partnership dealings and transactions, and payment of what should be found due to him on taking such account from the estate of John Robley; and an injunction to restrain the defendants from interfering in any way to prevent the Respondent from possessing the proceeds of the several plantations or estates. In that

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bill the Respondent stated, that he and John Robley, as partners in the firm of John Robley and Co., became mortgagees, and afterwards owners and proprietors of the plantations or estates, called respectively, Betsey's Hope, the Villa, otherwise Calliaqua, and Pembroke, with the negroes and appurtenances thereto belonging; and he thereby charged, that although it appeared that the mortgages and conveyances of the plantation or estate called Betsey's Hope, were recorded in Tobago as mortgages and conveyances to John Robley, upon the respective occasions of the mortgage and purchase thereof; yet the same was mortgaged and purchased with funds advanced and supplied by the Respondent on account of the partnership; and that the same was the property of the partnership, and that the produce thereof was always, during the lifetime of John Robley, treated as the property of the partnership, and was carried to the credit of the partnership in the partnership accounts.

That suit the Respondent did not prosecute, probably in consequence of the letters of administration, *pendente lite*, which had been granted to the defendants therein, having been revoked by the subsequent grant of probate to the Appellants.


In the month of May, 1823, the Appellants, Caroline Robley, William Blake, and James Cunningham, together with Henry Smith, since deceased, as the personal representatives of John Robley, exhibited their Bill of Complaint in the Court of Chancery, against the Respondent, praying that an account might be taken by and under the direction and decree of the Court, of all the dealings and transactions of the partnership from

the commencement thereof, and of all and every the receipts and payments made by John Robley and Charles Brooke, or either of them, on account or in respect thereof, and that the outstanding debts owing to the partnership might be collected, and that an account might be taken of the debts due and owing by the partnership; and that the Defendant might be decreed to pay what, on the taking of the account, should be found due from him to the partnership estate; the Plaintiffs offering, as the executors and executrix of John Robley, in a due course of administration, and so far as assets of John Robley should come to their hands, to pay any thing which might appear to be due to the partnership estate, from the estate of John Robley; and that the assets, property, and effects of the partnership, might be duly applied in payment of the partnership debts, and for that purpose, that a competent part of the property and effects might be converted into money; and that the clear surplus of the property and effects of the partnership might be ascertained, and that it might be declared that John Robley and Charles Brooke were interested in, and entitled to the property and effects of the partnership, in the proportions or shares of three-fourths to John Robley, and one-fourth to Charles Brooke; and with respect to so much of the surplus as should appear to consist of the estates and plantations in the West Indies, that it might be declared that the Plaintiffs, as representing John Robley, were entitled to three-fourth parts or shares thereof, and that all proper and necessary directions might be given for securing to them the possession and enjoyment of such shares, and with respect to so much of the

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clear surplus as should consist of money, that the same might be divided between the Plaintiffs and the Defendant in the proportions aforesaid.

The Respondent appeared, and put in his answer to that bill in the month of June, 1825 ; and the cause being at issue witnesses were examined.

In the month of May, 1827, the Respondent filed a cross bill in the same Court against the Appellants, William Blake, James Cunningham, and Caroline Robley ; and against Henry Robley, Fanny Ann Robley, Adelaide Robley, and John Horatio Robley, who were the children of John Robley ; and against George Robley and Christopher Irvine, and William Groom, who had survived his co-trustee, William Walton, thereby praying that an account might be taken by and under the direction and decree of the Court, of all the partnership dealings and transactions, from the commencement of the partnership to the retirement of Thomas Oliver Anderdon therefrom, and of all the receipts and payments made on account of the partnership, between Charles Brooke, and John Robley, and Thomas Oliver Anderdon ; and that the partnership accounts might be adjusted and settled, and the Plaintiff declared to be entitled to one-fourth of the profits of the partnership business ; and that in taking such account, the estate of John Robley might be charged with the sum of 2500*l.*, therein alleged to have been improperly paid to Thomas Oliver Anderdon, as his share of the profits of the partnership by John Robley, together with interest for the same ; and that an account might be taken of all the partnership dealings and transactions between the Plaintiff and John Robley, after the retirement of Thomas Oliver Anderdon ; and of

all receipts and payments made on account of such last-mentioned partnership ; and that all the outstanding debts of such partnership might be discharged, and the credits got in, and the accounts thereof settled and adjusted ; and that the Plaintiff might be declared to be interested in the last-mentioned accounts in three-eighth parts as to profit and loss of the said partnership, between the Plaintiff and John Robley, until the departure of John Robley to the West Indies ; and that it might be declared, that from that period the Plaintiff became entitled to five-eighth parts or shares ; or if not, then to one moiety of the profits of the said partnership, or that the Plaintiff was entitled to sufficient and ample remuneration for managing the business ; and that such remuneration might be settled by the decree of the Court ; and that it might also be declared, that in taking such accounts, the Plaintiff was entitled to a fair and reasonable allowance for the rent, outgoings, and fitting up of the counting-house in Sambrook Court, and to the annual sum of 500*l.* for entertaining the friends and correspondents of the said partnership business, and to a fair reasonable allowance for the Plaintiff's travelling expenses ; and that in such accounts John Robley's estate might not be allowed a larger sum for the ship Cove therein mentioned than he paid for the same, to wit, 5737*l.* 10*s.* ; and that John Robley might not be allowed more than was the fair value of the ship Phoenix, therein mentioned ; and that an account might be taken of all the transactions between John Robley and the Plaintiff, and particularly of the purchases of the mortgage debt of 94,511*l.* 1*s.* 6*d.*, and of the equity of redemption

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of the plantations and estates, called respectively, Betsey's Hope, Calliaqua, and Pembroke, and that it might be declared that the Plaintiff was entitled to one moiety of the estates and to one moiety of the rents and profits of the mortgage debt of 94,511*l.* 1*s.* 6*d.*, and of all other sums secured to John Robley and the Plaintiff, by the indentures of mortgage therein mentioned and the interest thereof; and that the Defendant, William Groom, might be ordered and decreed to convey one moiety of so much of the plantation or estate called Betsey's Hope, as was vested in him and William Walton, deceased, by the indentures of the 23d and 24th of September, 1814; and that the Defendants might be decreed to convey one moiety of the residue of Betsey's Hope plantation, to the Plaintiff, his heirs and assigns, for his and their own use and benefit, the Plaintiff offering to convey the legal estate in one moiety of the plantations and estates called Calliaqua and Pembroke, as the Court should direct; and that an account might be taken of the rents and profits of the plantation and estate called Betsey's Hope, from the time of the purchase thereof, and of the application of the same, and of the expenses and disbursements relating to the same, and to the support and maintenance of the negroes and slaves belonging to the same respectively; the Plaintiff offering, &c.

To this bill the Appellants, William Blake and James Cunningham, alone put in their answer, the other Defendants being out of the jurisdiction of the Court.

The facts herein-before stated were alleged in the pleadings.

The two principal questions in the causes were, —


1st. Whether the transactions relating to the estates of Sir William Young, in the West Indies, were partnership transactions of the firm of Robley and Co., and to be treated and dealt with as other transactions of the same partnership, or (as insisted upon by the Respondent) transactions entered into by Robley and the Respondent in their individual capacities, or in any other capacity distinct from their character of partners in that firm.

2ndly. In what shares and proportions John Robley and Charles Brooke were interested in the partnership from the time of the retirement therefrom of Thomas Oliver Anderdon, the Appellants insisting that John Robley was entitled to two-third parts, and the Respondent to one-third, while the Respondent claimed to be entitled to three-eighth parts from Anderdon's retirement until the departure of Robley to the West Indies in 1808, and to five-eighth parts from that time.

The evidence* adduced at the hearing of the causes was chiefly documentary. That on the part of the Appellants consisted chiefly of the indentures and other instruments herein-before mentioned, the books and accounts of the firm of John Robley and Co., the bills of costs of Henry Smith and William Walton, who were the solicitors of the firm of John Robley and Co., for business done by them in that character, a book marked AA containing copies of several indentures relating to the mortgage transactions. A voluminous body

* The parts of the evidence on which the order of the House is grounded are noticed in the judicial arguments, *post* 118, *et seq.*

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of correspondence, consisting chiefly of letters which passed between John Robley and the Respondent, and between John Robley and the firm of John Robley and Co. during the absence of the former in the West Indies: a sketch or plan of account, which was inclosed in a letter of the 3d of May, 1809, and the office copy of the bill filed in March, 1823, by the Respondent against Henry Smith and the Appellant William Blake.


The two causes came on to be heard before his Honour the Vice-Chancellor, on the 4th of June, 1829, when the following decree was made in both causes:—viz. It was declared that the said John Robley and the Respondent Charles Brooke, became the purchasers of and were interested in and entitled to the said mortgage debt or sum of 94,511*l.* 1*s.* 6*d.*, and the estates of Pembroke and Calliaqua, otherwise Villa, in the said island of St. Vincent, and the estates of Betsey's Hope, in the island of Tobago, in equal shares; and that the purchases thereof respectively were not transactions of the said partnership; and regard being had to this declaration it was referred to the Master, to take an account of the said mortgage debt or sum of 94,511*l.* 1*s.* 6*d.*, and the purchase-money for the same, and the profit made thereby down to the time of the purchase of the said estates called Pembroke and Calliaqua respectively, and from the respective times of the purchase of the several estates therein-before respectively mentioned, and that he should also take an account of the issues and profits thereof respectively, by whom the same were received, and of the several outgoings and expenses attending the same respectively. And it was also referred to the Master to take an account of the receipts and payments of the said John Robley

and Charles Brooke respectively, or of any other person or persons by their or either of their order, or for their or either of their use, in respect of the said mortgage debt ; and the profits made thereby and in respect of the said estates, and the issues and profits thereof, and the outgoings and expenses attending the same. And the Master was to ascertain and certify whether any thing and what was due from the said Charles Brooke to the estate of the said John Robley, or from the estate of the said John Robley to the said Charles Brooke, in respect of the matters aforesaid. And in taking such accounts the Master was to enquire and state to the Court whether any and what slaves were furnished by the said John Robley from his own estate, or which were his own property for the use of the said estate called Betsey's Hope ; and the Master was to enquire and state whether any and what allowance ought to be made to the said John Robley or his estate for the use of such slaves ; and if the said Master should find that any such allowance ought to be made, he was to include the same in taking the accounts herein-before directed ; and it was also declared that the said John Robley and Charles Brooke purchased the share and interest of the said Thomas Oliver Anderson in the said partnership in equal shares ; and that by virtue of such purchase, and of the assignment made by the said Thomas Oliver Anderson, of his share and interest in the said partnership to the said John Robley and Charles Brooke, they the said John Robley and Charles Brooke became entitled to and interested in the profits and loss of the said co-partnership, from the commencement thereof, in the following shares,

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(that is to say,) the said John Robley in five-eighths, and the said Charles Brooke in three-eighths. And it was declared that the said partnership continued between the said John Robley and Charles Brooke down to the time of the death of the said John Robley. And having regard to those declarations, it was referred to the Master to take accounts of the said partnership dealings and transactions, as well before the retirement of the said Thomas Oliver Anderdon as subsequently thereto, down to the decease of the said John Robley, and of the subsequent receipts and payments on account thereof. And the Master was also to take an account of what partnership effects were remaining, and what debts of the said partnership remained unpaid. And it was ordered that the said partnership effects should be applied in payment and discharge of such debts. And the Master was also to take an account of the receipts and payments of the said John Robley and Charles Brooke respectively in respect of the said partnership, or any other person or persons by their or either of their order, or for their or either of their use; and to ascertain and state whether any thing and what was due from the said Charles Brooke to the estate of the said John Robley, or from the estate of the said John Robley to the said Charles Brooke, in respect of the said partnership. And the Master was to enquire and state to the Court the amount of capital brought into the said partnership by the said John Robley and the said Charles Brooke respectively. And the Master was also to enquire and state whether the said John Robley and Charles Brooke respectively entertained the customers and friends of the

co-partnership. And in taking the said accounts, the Master was to consider whether the said John Robley and Charles Brooke respectively, or either of them, became entitled to any, and what allowance in respect thereof. And it was also declared, that the said Charles Brooke was entitled to compensation for the use of his counting-house and premises in Sambrook Court, and for the expenses incurred by him in keeping up the establishment for the said copartnership business there; and a reasonable allowance in respect thereof was to be made to the said Charles Brooke by the Master in taking the accounts therein-before directed. And the parties were to be examined on interrogatories, and to produce on oath all deeds, books, papers, and writings. And the Master was to be at liberty to state any special circumstances relating to the matters thereby referred to him, as he should think fit. And the consideration of all further directions and costs was reserved until after the Master should have made his report.

The appeal was against so much of this decree as declares that John Robley and the Respondent Charles Brooke became the purchasers of, and were interested in, and entitled to, the mortgage, debt, or sum, of 94,511*l.* 1*s.* 6*d.*, and estates of Pembroke and Calliaqua in St. Vincent's, and Betsey's Hope in Tobago, in equal shares, and that the purchases thereof respectively were not transactions of the partnership; and directs accounts to be taken, having regard to that declaration. And also, so much thereof as declares that John Robley and the Respondent Charles Brooke purchased the share and interest of Thomas Oliver Anderdon in the partnership in equal shares; and that by virtue

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of such purchase, and the assignment of the share and interest of Thomas Oliver Anderdon in the partnership, John Robley and the Respondent Charles Brooke became entitled to and interested in the profits and loss of the partnership, from the commencement thereof, in the proportions of five-eighths to John Robley and three-eighths to the Respondent ; and directs accounts to be taken, having regard to that declaration.

The case was argued for the Appellants by Mr. Knight and Mr. Kindersley ; for the Respondents by Sir Edward Sugden and Mr. Pemberton.

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The *Lord Chancellor*.—In this case I am disposed to advise your Lordships to alter the decree which has been pronounced by the Vice Chancellor, both upon the first and the second points that were made in the arguments at the bar, and considering that these points arise upon minute questions of fact, and matters of circumstantial proof, it would be a most useless task if I were to go again into any detailed statement of these matters, out of which this case has arisen, and which have been so fully discussed both here and in the Court below. I shall first submit the questions, and then state briefly the reasons why I cannot come to the decision at which the Court below has arrived.

The first question is, whether or not, upon Mr. Anderdon's leaving the partnership, his share was to be divided equally between the two partners, Mr. Robley and Mr. Brooke, or whether it was to be divided in the same proportion in which the shares were originally arranged in the house, namely, into three parts, two of these to go to Mr. Robley, and the remaining third to Mr. Brooke.

The other question is of a similar nature, and in a great degree in the same terms, though going into a much more enlarged view of the case, and that is, whether the purchase of Donaldson's mortgage, and the purchase of the Betsey's Hope estate, were partnership transactions, in which the partnership firm of Robley and Brooke would become interested in the profits, and liable to the loss that these transactions might entail upon them, in the proportion of two thirds and one third, or whether those are to be taken as out of the limits of the partnership, as exempt from the partnership, as private transactions between Mr. Robley and Mr. Brooke, and as if no partnership had existed for general purposes at all; in which case they would be entitled to the profits in equal moieties, and be liable in equal moieties to any loss also that might accrue.

Upon the first of these questions, with the best attention which I have been able to bestow upon the evidence and the arguments, I have no hesitation in coming to the conclusion, that the share of Mr. Anderdon was taken by the two partners in the proportions in which, at the formation of the partnership, it had been arranged that they were to distribute their profit and loss, that is to say, dividing two thirds to the one, and one third to the other; in short, that it fell into the partnership. This is a question of circumstantial evidence. One person will draw one inference from the same circumstances and facts appearing by parol evidence, or upon the face of depositions and documents, as in this case, and another person will form a conclusion and draw from those very same circumstances an inference totally different. After the

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greatest attention bestowed in sifting this evidence consisting for the most part of an investigation of the accounts, and the relative situation of the parties in these transactions, my noble and learned friend, whose assistance you have had in this long inquiry, and who has paid all possible attention to these circumstances, as well as myself, came to the conclusion to which, I may say, we both of us came independently, and in a great degree without communication upon some of the material views of the case, that the order pronounced by the Vice-Chancellor must be varied.


"I shall shortly run over a few of the particulars; to detail the whole would be useless. First, the whole profit and loss account is to be divided among the three partners; two shares to Mr. Robley, one share to Mr. Brooke. That was prior to Mr. Anderdon's leaving the firm. Now, looking at the transactions as they pass, who pays for Mr. Anderdon's share? The 2500*l.* and 2668*l.* 12*s.* 5*d.* come out of the whole concern, and therefore Mr. Anderdon's share was purchased in the proportion of two-thirds and one-third, two-thirds by Mr. Robley, and one-third by Mr. Brooke. Whatever was due upon Mr. Anderdon's share, comes out of the same fund, and is borne in the same proportions. Then look at the sixth article, which provides that in the event of Mr. Anderdon dying, the whole is to be divided in these proportions of two-thirds and one-third: the event contemplated (the death of Mr. Anderdon) being provided for in this way, raises a very strong probability that in the same way an event not provided for, a *casus omissus*, that of Mr. Anderdon retiring and not dying, should be provided for in like manner, unless proof to the

contrary could be shown. This consideration would be enough to throw the *onus* of proof on the other side, which *onus* has not been discharged, and without that evidence to bear me out, I must draw an inference from the facts opposed to that come to by the Vice-Chancellor.

The attorney's charges with respect to the dissolution of the partnership, and the payment of them, was also alluded to, which will be found in the thirty-second folio of the Appellant's Appendix, and the mode of paying the 2500*l.* in the third and fourth folios, and Sir William Young's account running through the years 1804 and 1805. If your lordships will look at the Appellant's Appendix 18, A. and B., it will clearly appear that they run through that year; they go on after April 1804 to the end of that year, and the balance is carried down after Mr. Anderdon's retirement: the transaction is treated as a charge for interest, and it is there brought into the balance of the former firm to the credit of the new firm. This observation is very material, not merely with respect to the first point in the cause, but is very powerful also upon the second, which is more important than the first.

A good deal was said upon the funds, and the manner in which they were brought into the concern, in reference to the second part of the case. It is said that the prayer of the Respondent's cross bill shows, that he did not object to the two ships, Phoenix and Cove, being treated as money or money's worth, and carried to the credit of the new firm. Another observation upon this important part of the case, it is fit to make, and I make it in the outset upon the second point, and that is,

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that the advances made by Mr. Brooke were repaid, with interest, on or before 1815, as appears in the eighth folio of the Appellant's Appendix.

With respect to the second point, in addition to what I have already said, it is clear that Sir William Young was indebted to the firm; from that original debt to the firm, springs the transaction of the purchase of this mortgage; and it is to be observed that Donaldson's mortgage was only completed in September after the purchase of the Betsey's Hope, and after the mortgage of the Betsey's Hope was complete, the description of Robley and Brooke as partners, in the assignment of the mortgage, is not material.

Much is said, as I have already observed, upon the source from which these monies proceeded, and I may as well here make a general observation, which greatly guides my opinion upon the second point. It is said the money came from Mr. Brooke. Now, that a great deal came from Mr. Brooke, is doubtless true; a great deal from Brooke and Co.; some from Mr. Brooke as an individual, and some from Brooke, Webb, and Cole. But how did it come? In what way? It came through the firm of Robley and Co. It came through the partnership concern. It was not that Mr. Brooke lent the money to Mr. Robley, with which he was to purchase the assignment; it was not that they two jointly, as individuals in the firm, entered into this transaction together, but every thing was brought first into the firm; it all came through the firm. At first, the money was lent by these partners to the firm, and then by the firm was employed in purchasing a mortgage; the firm thereby

became indebted, not to the firm, but to Brooke and Co., and the others, whoever advanced the money, and the firm being so indebted, became bound to pay the principal and interest. Then the firm used that money as partnership funds in purchases and in speculations in the West Indies.

Now does it make any material difference in this matter, that it appears that the money was advanced by one of these partners in a larger proportion, even a much larger, than the other, when it was all done in the name of the firm? The first step in every one of these transactions, was to debit the firm with the amount of that advance, and then credit the same firm with the amount of the purchase. It is admitted that the payment of the instalments were made, and it appears upon the extracts from the books, that they were made by the firm providing funds to meet the bills, by means of transactions with their bankers. Sometimes they were provided for in one way and sometimes in another, and upon some parts of the transaction it appears, in the course of the accounts, that the advances were made (and that bears upon this point) by Mr. Brooke, or those with whom Mr. Brooke was concerned.

If we look at the other details of the case, the solicitor's bills of costs for instance, in the Appellant's Appendix, folio 72; if we look at the mortgage accounts in the Appellant's case, folio 10, and the Respondent's Appendix, folio 24, it proves the transaction to have been that of the firm. Mr. Brooke, some considerable time before that, had come to the management of the concern in London: he sees that account so

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stated in the books, and with that matter staring him in the face he makes no memorandum; he makes no alteration; which leads me to another of those general observations upon the second branch of the case, very important against the decision come to in the court below, namely, that every thing was entered in the partnership books: it was entered as a separate account, but still all was in the partnership books. Now though I agree that an explanation of that may be found in the convenience of a West India concern being entered in the books of a West India House in which both the parties to the concern were partners of the house, the house being also the consignees of the produce; though I agree that this will account for making the entry in these books; surely it will not account for that entry being made without a single note or memorandum, or so much as a word or hint, that although this appeared in the book it was not a partnership transaction between persons who were unequally interested in the partnership. If they had been equally interested, I can conceive that it might have been left without making any memorandum; but as one had double the interest of the other it is utterly unaccountable, if it was not a partnership transaction, how it should have found its way into the books, and continued all along without a single note, or memorandum, or mark to distinguish it.

The way in which Cuthbert's mortgage was paid off also turns upon this part of the question, and a variety of other particulars to which I need not refer. I am only going over a few of the leading facts which confirm my view of the case.

With respect to the documentary evidence, it consists not only of the accounts, but the letters, and the bonds, deeds, and conveyances. Of the letters I shall say a word presently: of the accounts I have spoken by a general reference; but of the bonds, deeds, and conveyances, I shall only say, that upon the best attention I have been able to give to them I think they are not decisive either way: that the language of many of them, as in the letters, is inconsistent with either view of the case; and as to the word "jointly" being used, for instance, and "joint interest," and "joined in equal moieties," and "the same proportions as they were interested in the firm," I pass over that part of the documentary evidence without further remark.

With respect to the letters, more observations arise upon some of them, and I shall refer to one or two. I refer to the letter of December, 1813, in folio 65 of the Appellant's Appendix, and still more to the letter immediately preceding it, the letter of September 11, in folio 66, and I confess I cannot reconcile either of these letters with any other opinion than that which I have stated. I might cite the letter in folio 52, dated May 4. 1809, as being very strong, but I rather rely upon the letter of the 3d of December, 1813, in which Robley and Brooke, that is Mr. Robley says, "He (that is Mr. Cuthbert) has sent his solicitor to us, who not receiving an answer as soon as he presumed it would be given, a correspondence has taken place with him;" and at the conclusion of the letter he says, "we ardently wish you had made up your mind finally to settle all matters that relate to Betsey's Hope

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“ and the Antigua Estates, as well for your own
“ sake as for ours, and that of our heirs and ex-
“ ecutors.” He is writing in the name of the
firm ; but what I chiefly refer to is in the upper
part of page 56., in which, writing in August,
1811, to Mr. Robley, Mr. Brooke, as an indi-
vidual, uses this expression — “ From the miserable
“ price of sugars, and the unfavourable appear-
“ ances as long as the war lasts, the two estates in
“ St. Vincent’s and likewise Betsey’s Hope, must
“ infallibly become losing concerns *to this house*.
“ If a very fair crop and good prices left so small
“ a surplus in the accounts of each of these estates
“ last year, what are we to expect this year ? ”

I confess I can hardly conceive any observation
that can do away the effect produced by the pro-
duction of this letter from Mr. Brooke to Mr.
Robley.


It is then argued, that there is great impro-
bability in a partnership with so small a capital pur-
chasing an estate to so large an amount. In the
first place, that observation is rebutted by the
nature of the transaction itself. It was a specu-
lation entered upon in the firm expectation of two
out of three crops repaying the expense : that ap-
pears from Mr. Durand. In the next place, the
observation is rebutted by this consideration, that
the sums (which is undoubtedly a fact and not
denied) that the sums to be paid were made pay-
able in a long period of time stretching from the
1st of June, 1804, to the 1st of December, 1807,
the purchase being made in June, 1804 ; so that
the whole transaction extended over three years
and a half, and the sets of bills were made payable
at different periods within that space of time.

The observations that I have made respecting the non-entry of any memorandum to differ this from other partnership transactions having appeared, as it should seem, to the Respondents, to throw back upon them the burthen of proof, they have resorted to the evidence of Mr. Durand, and to the answers. In the course of the argument I threw out, with respect to those answers, an observation that they were highly creditable to Mr. Brooke: he only swears to what he calls an understanding — an “express understanding,” — meaning, a precise and perfect understanding as to the partnership, and any other point that they may understand between them. But it is impossible, when your lordships consider the different shares in which the parties were interested in the firm, one having a share double of the other’s, and both expecting that this was to be a certain and safe speculation, producing a profit to the amount of 25,000*l.*, it is impossible it could have rested so much in generals: surely it would have rested upon something that the parties could depend upon; something more than a tacit understanding: surely something must have passed of a nature not accurately described. In calling it only “an understanding,” it seems to follow that they must have come to a consideration of the shares of the profit; they knew if nothing else was done, that if it went into the book it must go into the partnership, and yet neither Mr. Durand will take upon himself to say, nor Mr. Brooke to swear in his answer, that a single word of a precise and specific nature passed as to the apportionment of the shares. I can understand perfectly no agreement existing between parties where

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there was a tacit understanding between them ; and that nothing should pass in writing when transactions of a small amount and little moment are entered into : but that when a partnership is on the eve of entering into, or immediately after they have entered into a transaction of such an amount as 95,000*l.*, with little or no risk, there should be only a tacit understanding between parties, — that in such a situation, and upon such a subject, and with such interests at stake, nothing definite should be settled, I confess I cannot at all comprehend. If it was, as Mr. Brooke says (and I dare say he firmly believed it as the result of his impression), that they were to have equal shares, it must have been at that time stated, and could not have been allowed to rest upon vague recollection and general understanding ; and if it was understood between them, it must have been stated in some such words as these — “ This is not a partnership transaction ; “ remember this is not a transaction for the benefit “ of the partners in partnership shares ; remember “ this is not a transaction that gives two-thirds of “ the profit, or loss, to one, and only one-third of “ the profit, or loss, to the other.” It must have have been so stated and contained somewhere, if it was as Mr. Brooke contends.

The only hesitation I have felt in this case, arises from the evidence of Mr. Durand, and so I stated to your lordships shortly on the last day of the argument at your lordships’ bar. I have had some doubt, whether, regard being had to his evidence, and the possibility of what might arise upon the cross-examination of Mr. Durand in this case, upon a trial at *nisi prius*, I should not advise your lordships to direct an issue in order

obtain the benefit of that cross examination. Upon the fullest consideration I have been able to give to the subject, and the mature deliberation of my noble and learned friend who assisted your Lordships upon this occasion, we have come to the conclusion that we ought not to take that course. If the whole matter were to go into at nisi prius, it would be attended with the greatest inconvenience; and you cannot have the examination and cross-examination of Mr. Durand, without entering into the whole of the accounts; for the manner in which his recollection or credit is to be put to the test must be by a mode only, namely, going through the accounts in the course of his examination, and particularly his cross-examination: a more cumbrous and inconvenient proceeding, and one less likely to lead to a satisfactory or beneficial result, I cannot imagine.

When comes this practical consideration:—Suppose Mr. Durand, on his cross-examination, has his credit seriously broken in upon; suppose his recollection is found to be inaccurate upon comparing it with the documents; suppose that in that or other way the credit of Mr. Durand should be reached at this distance of time, (I know not how much longer it is than at the time when he was examined,) and suppose that the result is to place whatever weight there is due to the evidence of Mr. Durand; that would only strengthen the conclusion to which I am prepared to come, by contrasting his evidence with the documents and evidence taken altogether. But suppose, on the other hand, that Mr. Durand's evidence was impeached, suppose that it was not impeached and

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broken in upon at all by the result of his cross-examination, then I ask myself this question,—would he stand in a better situation than he does now? or would the cause, as standing upon his testimony and the documentary evidence, be in a different situation from that in which it now stands? It would only end in this, that the case would stand exactly as it now does, with this slight addition in favour of the Respondent, that Mr. Durand's testimony would have undergone a scrutiny and sifting in the investigation. I do not think that would be sufficient to entitle the Court, with the documentary evidence and the accounts before it, (even admitting Mr. Durand so far mixed up with the transaction,) to call for an issue, and shake the conclusion to which the evidence, including Durand's deposition, (suppose it unimpeached,) has induced me to come.

Upon these grounds, I shall only state, that no person who reads Mr. Durand's evidence can have any doubt that he must, at *Nisi Prius*, answer some questions in a particular way. I will throw out one: suppose he was asked respecting the profit arising upon the transactions during the three months, whether or not it would have gone into the general partnership. I am sure no jury could believe him, if he was to take upon himself to say, confidently speaking to the fact, that it would have gone into a different account. It would be impossible so to believe; but if he gave it as opinion only, then it must be tried in that way by the test of its consistency with the general course of the transaction. If he said that the profit which had been made, or the loss which had arisen after the purchase of Donaldson's mortgage, would have gone


into the place where all the other accounts go, — there is some little doubt with respect to what has been called the suspense account, but, with that exception, almost all the items of profit or loss go into the partnership accounts — if, I say, that were his answer, it would only tend to strengthen the conclusion to which I am now disposed to come; but if that were not his answer, I must say that his testimony would be at variance with the whole results of the evidence, and the general mode of keeping these accounts, and I should be inclined to adopt a conclusion opposite to that at which Mr. Durand had arrived.

Upon the whole, I think there ought to be no issue, but that this decree must be altered and varied in conformity with the statement I have now made: that Mr. Anderdon's share went into the partnership, and was to be distributed between the two partners in the proportion of two-thirds and one-third; and that Donaldson's mortgage, and the other transactions under the second head, were partnership transactions to all intents and purposes.

Lord Plunkett. — My Lords, it is hardly necessary for me to do anything more, after what has fallen from the Noble Lord on the woolsack, than to say that I entirely concur in the conclusions and the reasons which he has stated.

There are two questions in the case, as your Lordships are aware. The first respecting the share upon the retirement of Mr. Anderdon, at his ceasing to be a member of the partnership. That is a question—whether the share upon the retirement of Mr. Anderdon was to be divided equally among the remaining partners, or in such proportion as between these two partners the

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profits had been before divided—whether equally, or in the proportion of two and one.

Now, we find that the deed provides that nothing that should arise in consequence of the death of Mr. Anderdon should vary the proportions as they had existed before. Then, in addition to that, you have the mode in which the money upon the retirement of Mr. Anderdon was provided. It comes not in equal shares, but from the profits of the partnership, which were confessedly in the proportion of two to one; you have that entirely fortifying the inference from the previous state of the shares.

I do not find it in any part of the case asserted, with respect to this part of the question, that any special agreement was entered into between Mr. Brooke and Mr. Robley, varying the original terms upon which they stood. On the contrary, on looking at the judgment given by the very eminent Judge who decided this case below, he states that no evidence appears before him of any special contract to vary the natural course of dealing between the parties.


In addition to this, you have the terms of the decretal order, for the decretal order says (and it was argued very ingeniously) that there was a new contract between the parties. I am not disposed to enquire very minutely whether it is a new contract or a new partnership; but if the trade was to be carried on upon the same terms as before, then it is a dispute about words. Whether it is the old partnership or not, substantially it is the same thing. What is the decretal order? The learned Judge arrives at this conclusion, that the share of Mr. Anderdon is to be divided between the parties

so as to give, upon the whole, five-eighths to Mr. Robley, and three-eighths to Mr. Brooke. How are the five-eighths to Mr. Robley made out? That divides Mr. Anderdon's share equally between the parties; it gives one-eighth to each, Mr. Anderdon having a fourth. But how does it make out the five-eighths and the three-eighths? Only upon the supposition that the four-eighths belonged to Mr. Robley, and two-eighths to Mr. Brooke. That is a distinct affirmance that the shares of the original partnership continued, and I find nothing to meet this view of the question. The terms of the partnership deed are so, and the terms of the decree warrant that inference; and I find nothing to meet the conclusion from it, except that Mr. Brooke states in his answer (and I am quite willing to suppose that he believes that which he states to be perfect truth) that there was an understanding between him and Mr. Robley that the share of Mr. Anderdon should be divided equally. After what has fallen from the Noble Lord on the woolsack, I need not say how very vague this is, but it does appear to me there must have been some special agreement entered into to warrant it. How is it possible to suppose, if there was such an agreement, that nothing of the kind should be found in any of the books of the firm, and that the parties should not be able to state that any conversation took place, upon which an agreement of that sort was made?

Upon the first point, therefore, with every respect for the very eminent person who made the decree, I cannot rely upon the opinion he has expressed.


Upon the second point, how Donaldson's mortgage was to be divided, that is governed very much

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by the same principles. The only difference arises from the evidence of Mr. Durand applying to the latter question, and not to the former.

Now upon the question as to the mortgage, it must be admitted, if there was a division made of the mortgage equally, and not as two to one, there must have been some specific agreement upon the subject. According to the partnership deed, although the capital was equal, the shares of profits were unequal, and in the proportion of two to one; then this must be taken to be done in the ordinary course of the partnership transactions, unless something appears to the contrary. Some special agreement must have been entered into to vary it. Now what grounds have we given us to shew that there was such a special agreement? The entries in the partnership books continue to go on exactly as before, and it is just the same as with Mr. Anderdon's share; the purchase is made, not out of the separate funds, but out of the partnership funds; the instalments are paid by bills, which are accepted by the house, which they procure to be discounted, and pay the money; and one of the deeds of conveyance of the mortgage states the consideration to be, the payment to the assignors by the acceptances of the firm of Robley and Company.

I cannot conceive upon what principle it can be contended, supposing the monies were furnished in the first instance by Mr. Brooke in an unequal proportion (and perhaps the most of it), that therefore the parties so advancing those monies were to get shares in proportion to their advances in the estate purchased. The argument, if good for any thing, would go this length, that Mr. Brooke should have not an equal share, but a share

much exceeding that of Mr. Robley. If you say that in proportion to the sums advanced the parties should be entitled to the estate, you would have to apportion it in different shares, and could not hold that they were equally interested. But there is no principle for saying that if one man lends money to another for the purchase of an estate, that the man who lends the money gets an interest in the estate; that is not a principle of law, and I do not think it was contended for at the bar. He may or may not acquire a lien; but as to his getting a share by virtue of his lending the money, such a thing was never heard of. Then it only affords a ground for presuming that a partner would not enter into such a contract, and advance such a considerable sum of money, unless it was by virtue of a special agreement that he should at least have an equal share. It is a ground for conjecture, but we are not to go upon conjecture. To make out the case of the Respondent, you must suppose that, the parties being interested in unequal proportions when the one has two thirds and the other has one third, and a long negotiation growing out of this transaction, and a large profit arising from it, there was an agreement that they should become partners in different proportions, that they should be partners in equal shares. It might be so, but we must have something more than conjecture. It is admitted that the partnership funds were pledged for the payment of this consideration, and that that pledge was followed up by its being paid out of those funds; and those who advanced the money became creditors upon the estate, and the estate was their debtor; and it

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appears that they have been paid principal and interest, but the funds of the firm were pledged.

There is one observation that strikes me as having some value. The funds of the partnership having been pledged, supposing this question had not arisen between Mr. Robley and Mr. Brooke; but suppose any disaster had happened to these estates, and suppose the question had arisen between the joint creditors of the firm and the separate creditors, it would be very difficult to say that these estates so purchased were not joint estates. It would be very unjust, if a bankruptcy arose, to say that the partnership creditors should not be entitled to come upon the estates as partnership funds, but should come in at the tail of the separate creditors of Robley or Brooke. In the distribution of the effects, the joint creditors would come upon the joint funds, and the separate creditors upon the surplus, which becomes the separate fund after the payment of the joint creditor. Now would it be a just thing to the joint creditor, to say you shall not come upon the joint estate till all the separate creditors who have had dealing with Mr. Robley and Mr. Brooke shall be first paid? A party might enter into a contract of that kind; but it would be very unjust, if you must decide that it is the joint property of the firm. The question arising between Mr. Robley and Mr. Brooke cannot make any difference in the case.

A great deal of reliance has been placed upon the circumstances of the profit and loss account not being regularly settled in the partnership books; and it is said that that affords some ground of conjecture. Whether that has been satisfactorily

explained by the evidence from the waste book, I will not say ; it goes some way, because there is an entry that the parties are not agreed upon it, but that it shall depend upon the profit realised by the produce of the estates ; and it is not, therefore, satisfactory. There were some years when there was a real profit, but it goes some way to shew that it is not a settled account.

Suppose the case of the Respondent to be a true case, and that it was a partnership dealing between Mr. Robley and Mr. Brooke, not upon the original terms of the partnership, but that they were to have equal shares, would you not require a profit and loss account that would make part of their general account ? Now you have no statement upon either hypothesis of what was the profit and loss upon this dealing. If the books were regularly kept, and not merely a suspense account, this ought to appear in the books upon either hypothesis. Then if there is a matter that ought to appear upon either hypothesis, the absence of it cannot be brought in in favour of one or the other ; and, therefore, I do not feel my mind so strongly impressed by that as the minds of those very ingenious persons were who argued on behalf of the Respondent.

This is matter of conjecture. I am called upon to make out a special case. I ask what is the evidence of it ? Is it not a most extraordinary hypothesis ? If the parties were going on upon the original transaction, all is natural ; but if a new agreement, if a special case of a new agreement is to be made out, is it not the most extraordinary thing that, from the beginning to the end of these

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accounts, you do not find a single entry affording evidence of it?

Then comes the evidence of Mr. Durand, and it is the only point upon which I have ever felt any kind of difficulty. According to his evidence, it appears that Mr. Robley had used language amounting to this, that the interest of this 25,000*l.* would afford to each a profit of 350*l.* a year, calculating at 6*l.* per cent., and that would imply an equality; but Mr. Durand does not go the length of saying, that it was ever said or written, or expressed between the parties, that they should have an equal share in the mortgage transaction; and it is at such variance with the entire entries from the beginning to the end, that I cannot feel myself justified in submitting the propriety of sending this case to any issue. The question I have asked myself is this, suppose it went to an issue, and suppose by the verdict of the jury the testimony of Mr. Durand was confirmed, should the conscience of a Court of Equity be satisfied, upon that verdict, to decide that the shares were determined by a special agreement? If this case came back with a verdict affirming Mr. Durand's evidence, and leaving him better in this respect that he has stood the test of a cross-examination, I should not feel justified in pronouncing an order grounded upon that supposition.

Under these circumstances, I am of opinion that no issue ought to be directed. It would be a very troublesome investigation, and a very useless one; because, after the verdict, whichever way it should be found, the House would be just in the same situation as now, as to the grounds of their judgment.

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Ordered by the Lords, &c., that so much of the said decree as is appealed from be and the same is hereby reversed. And it is declared, that J. Robley, and the Respondent Charles Brooke, became the purchasers of and interested in and entitled to the mortgage debt or sum of 94,511*l.* 1*s.* 6*d.*, and the estates of Pembroke and Calliaqua in St. Vincent's, and Betsey's Hope in Tobago, in the petition of appeal mentioned, in the shares and proportions in which they were interested in the profits and loss of the partnership of J. Robley and Co. in the petition mentioned, and not in equal shares; and that the purchases thereof respectively were transactions of the partnership of J. Robley and Co.: and it is also declared, that upon the retirement of the said Thomas Oliver Anderdon, his share and interest in the said partnership accrued to and devolved upon the said John Robley and the said Charles Brooke, in the proportion of two-thirds to John Robley and one-third to the Respondent Charles Brooke, and not in equal shares. And it is further ordered, That the accounts to be taken in the said cause be directed to be taken having regard to this judgment and the declarations herein contained, instead of such accounts being taken having regard to the declarations in the said decree appealed from and varied by this judgment.

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(EXCHEQUER CHAMBER.)

MATTHIAS PRIME LUCAS,	} <i>Plaintiffs in Error ;</i>
WILLIAM THOMPSON,	
PHINEAS DAVIS, JOSEPH	
BULL, THOMAS LING-	
HAM, and CHARLES	
EICKE - - -	

CHRISTOPHER NOCKELLS - *Defendant in Error.*

To an action of trespass, for entering a ship and seizing goods, the Defendants pleaded, that H. and L. had recovered a judgment against one T., and had sued out a writ of *fi. fa.*, by virtue whereof the Defendants, as sheriffs, &c. entered and took in execution the goods being the goods of T. The Plaintiff, admitting the judgment and writ, replied *de injuria absque residuo causæ*, and new assigned that the Plaintiffs “at other times, and on other occasions, and for other purposes than in the plea mentioned, entered and seized the goods.”

Upon the trial it appeared in evidence that the Plaintiff was sole owner of the ship; that the goods were shipped in Van Dieman's Land for London; that the master signed bills of lading, which stated that the goods were shipped by T., to be delivered in London to H. and L., he or they paying freight, &c.; that the ship arrived on the 27th of June, that a treaty had been going on between the Plaintiff and H. and L. respecting the rate of payment for the freight, and that on the 4th of July the Defendants seized the goods, which were assigned by the sheriffs to H. and L. The Plaintiff also gave in evidence — 1. A memorial dated on the 4th of July, presented to the Commissioners of the Customs by H. and L., in which they stated that they were the importers of part of the goods seized — 2. A certificate by H. and L. to the Excise Office, that some oil, (other part of the goods seized,) had never previously been sold, and that a sale thereof by auction, then intended, was the first sale

thereof — 3. A written authority to their broker to buy the oil at a certain price, as their property.

The Defendants gave in evidence the shipping of the goods by T., the charter party, the writ, &c., and the seizure of the goods by the officers, &c.


Held, that it was competent by law upon these pleadings for the Plaintiff to shew at the trial, in maintenance of his action, that the acts of the Defendant were not really done under, or in execution of the writ, but for another purpose, under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods without paying the freight.

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IN Hilary Term, 4 G.4. — The Defendant in error brought an action of trespass in the Court of King's Bench against the Plaintiffs in error, for breaking and entering his ship, and seizing and taking certain goods and merchandize then being therein.

To this action two of the Plaintiffs in error (Lucas and Thompson) jointly pleaded — first, not guilty; and, secondly, that at and before the time of the supposed trespass they were Sheriffs of Middlesex: that Hopley, G. A. Lingham, and T. Lingham, had recovered by judgment, &c., against one Thornton, a debt of 20,000*l.* and 84*s.* costs; that thereupon they had sued out a *testatum fieri facias* against Thornton, directed, &c.; that the writ being delivered to them (Lucas and Thompson), as such sheriffs, by virtue thereof, and of a warrant duly made by them to two of their officers, Davis and Bull, &c., they, D. & B., before the return of the writ, entered the ship, and took in execution the goods, &c., being the goods and merchandizes of Thornton, and liable to be taken in execution by virtue of the writ, and justified in the usual manner the breaking, &c. hatchways to get at them, and

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fixing tackle to the ship for the purpose of removing them.

The other Plaintiffs in error, *viz.* Davis, Bull, Lingham, and Eicke, severally pleaded — first, not guilty; and secondly, Davis and Bull severally justified as sheriff's officers, acting under the said writ and warrant; Lingham justified as one of the plaintiffs in the writ, and as an assistant to the officers; and Eicke justified also as an assistant.

On the pleas of not guilty respectively, the Defendant in error joined issue; and to the other pleas, after protesting the judgment and writ, replied the common replication *de injuria absque residuo causæ*, and new assigned that the Plaintiffs “at other times, and on other occasions, and for “other purposes than in the said pleas mentioned,” and with excessive and unnecessary force and violence, broke and entered the said ship, and seized and carried away the said goods.

On these replications the Plaintiffs respectively joined issue, and with the exception of Lucas and Thompson, who joined in their plea, pleaded severally not guilty to the new assignment, on which pleas also issue was joined by the Defendant.


On the 4th of July, 1826, the cause came on to be tried before the Chief Justice of the King's Bench and a special jury at Guildhall, when, to support his case, the Defendant in error gave in evidence that he was sole owner of the ship in which the goods were seized; that they were shipped on board at Van Dieman's Land, for London; and that the master of the ship signed bills of lading for the same, which contained, amongst the matters usual in such instruments, that the goods were shipped by Nathaniel Thorn-

ton, to be delivered at London to Messrs. Hopley and Lingham, or to their assigns, he or or they paying freight for the goods as per charter, with primage and average accustomed.

The Defendant further gave in evidence that the ship having the goods on board arrived in safety in the river Thames about the 27th of June, 1823; and that subsequently thereto, and before the issuing of the execution, various communications took place between the Defendant and Messrs. Hopley and Lingham, relative to the delivery of the goods: that the Defendant at first offered to deliver the goods to Messrs. Hopley and Lingham, if they would pay freight for the same, according to a charter-party, recited in the charter-party hereinafter particularly referred to, and therein stated to have been put an end to, but subsequently offered to deliver the goods on their (Messrs. Hopley and Lingham) expressly agreeing to pay freight for the same according to the then existing charter-party, which was the charter-party referred to in the bill of lading, and under which the goods were shipped by Thornton, and in which the rate of freight was lower than in the recited charter-party, but that Messrs. Hopley and Lingham refused to enter into such agreement.

The Defendant then further gave in evidence certain port entries and affidavits, bearing date the 4th of July, 1823, and made by William Elliott, the master of the ship, and the plaintiff Thomas Lingham; and also a memorial of the same date, presented to the Commissioners of Customs by Messrs. Hopley and Lingham, which stated Messrs. Hopley and Lingham to be the importers of the oil and whalebone, parcel of the goods so

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The Defendant then gave in evidence two written documents, bearing date the 7th of August, 1823, signed by Messrs. Hopley and Lingham, and which were annexed to a catalogue of sale by public auction of (amongst other things) some of the oil, parcel of the goods and which had been delivered and left by Messrs. Hopley and Lingham at the Excise Office, and that no auction-duty was payable on the first sale by the importer of such oil. The first document was a certificate to the Excise Office from Messrs. Hopley and Lingham, that the oil therein mentioned (being parcel of the goods) had not been previously sold or parted with, and that the then intended sale by auction was the first sale thereof. The second was an authority to their brokers to buy the oil at a certain price therein mentioned, being their property.

The Defendant then further gave in evidence, that on the 4th of July the Plaintiffs Davis, Bull, Lingham, and Eicke, came on board the ship; and that Davis then produced the warrant of the sheriff Lucas and Thompson, and that Eicke gave directions as to the unloading of the goods; and that Davis, Bull, Lingham, and Eicke broke open the hatches of the ship, which Defendant had closed, in order to prevent them from unloading the cargo, and began to unload the cargo, and continued to do so until the 17th of the same month, when all the goods were taken out of the ship; and that the Plaintiff Davis had said that the amount of the sale of the goods so taken out was 1950*l*.

The Defendant further gave in evidence a notice, bearing date the 5th of July, 1823, and signed Nind and Cotterill, attorneys for the Defendant, and served upon all the Plaintiffs, calling upon them

to quit and deliver up possession of the ship and goods, and then closed his case.

Whereupon the Plaintiffs in error, in support of their case, by the evidence of William Elliott, the captain of the ship, duly proved the execution of a charter-party, bearing date the 8th of August, 1822, being the charter-party under which the goods were shipped by Thornton, and hereinafter referred to. And by the evidence of William Elliott further proved that the goods seized under the execution were shipped on board by Nathaniel Thornton, at Macquarrie and Van Dieman's Land, and that the ship arrived in safety with her cargo at the London Docks, on the 28th of June, 1823. That on the 3d of July the Plaintiffs, Davis and Bull, came on board and brought a warrant to seize the goods; that they left a paper which they called a warrant, and which he gave to the Defendant. That the hatches were at that time open, and that the Defendant desired him to lock them down until further orders. That he, Elliott, told the Defendant he thought he was wrong in detaining the cargo, as the freight was not due until ten days after delivery; and that the Defendant said he would be damned if he cared. That Defendant desired him not to allow the use of the tackle to discharge the ship, and that the Plaintiffs got their own tackle to get out the cargo, and that they did no damage.

Upon his cross-examination he stated that he had had disputes with the Defendant since his return to England, and had brought an action against him; that the ship was employed from March, 1821, till August, 1822, under another charter-party, which was cancelled. Upon re-exa-

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mination, stated that the Plaintiffs did not stay beyond the time necessary for getting the goods out.

The Plaintiffs then gave in evidence a power of attorney under seal, duly executed by the Defendant, and bearing date the 22d of September, 1820, whereby the said Defendant (amongst other things) authorized his son, Christopher William Nockells, to charter and let to freight the ship.

The Plaintiffs then gave in evidence the charter-party, of the 8th of August, 1822, which was under seal, and made between the Defendant and William Elliott of the one part, and Nathaniel Thornton of the other part, and which was duly executed for and on behalf of the Defendant, by Christopher William Nockells, acting under the authority and by virtue of the power of attorney, and by which charter-party, after reciting another charter-party made between the same parties, bearing date the 16th day of April, 1821, and that they, the Defendant and William Elliott, at the request of Nathaniel Thornton, had agreed to put and to and determine the same. The Defendant and William Elliott covenanted and agreed that William Elliott would receive on board the ship such goods as should be tendered to him by Nathaniel Thornton, and therewith proceed to the port of London, and there make a right and true delivery of the cargo unto Nathaniel Thornton, his executors, administrators, and assigns. And Nathaniel Thornton thereby for himself, his executors, administrators, and assigns, covenanted and agreed with the Defendant and William Elliott, that he, Nathaniel Thornton, would, within ten days after the delivery of the cargo in the port of London to Nathaniel Thornton, his executors, ad-

ministrators, or assigns, pay or cause to be paid to the Defendant, &c. freight for the use of the said ship, at and after the rate of 15s. per register ton per calendar month, for the use of the said ship from the 1st day of May then last past, until her final discharge in the port of London.

The Plaintiffs then gave in evidence the *testatum fieri facias* directed to the Plaintiffs, Lucas and Thompson, sheriff of Middlesex, and their warrant to the Plaintiffs, Davis and Bull, as in the pleadings mentioned; and that they, Davis and Bull, after the delivery of the warrant to them, went on board the ship and seized the cargo as in manner hereinbefore mentioned. Whereupon the Defendant produced and gave in evidence a bond of indemnity from Messrs. Hopley and Lingham to the sheriffs, conditioned to save harmless them and their officers for any thing done by them under the writ.

The case being closed on both sides, the Chief Justice proceeded to charge the jury, and after detailing the evidence, stated to them that he was of opinion that the possession of the ship remained in the Defendant, and that the question for their consideration was, whether the goods were really and *bonâ fide* taken by virtue of the writ of execution, for if they were the verdict ought to be for the Plaintiffs in error; or whether the execution was had recourse to merely as a colour, to enable the Plaintiff Lingham and his partners, who were the consignees, to take the goods, and so get possession of them and land them as importers, without subjecting themselves to the claim or question that might have arisen if they had accepted them under the bill of lading; in which latter case the verdict ought to be for the Defendant in error.


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Whereupon the Counsel on the part of the Plaintiffs interposed and objected; first, that the question so proposed by the Chief Justice for the consideration of the jury, was not open for their consideration upon the pleadings in the cause, for if there was ground for imputing fraud it ought to have been specially replied; and secondly, that none of the counts in the declaration had been proved, and the Chief Justice ought to direct and charge the jury upon the evidence produced, that the possession of the ship was not, at the time of the entering of the same by the Plaintiffs by law, vested in the Defendant, and that the Defendant had no lien on the goods, and consequently that the Defendant was not competent to maintain the action; but from these objections the Chief Justice dissented; and repeating the opinion so by him given, and the question so by him submitted for the consideration of the jury, he, with the direction aforesaid, left the issues aforesaid to them, who gave a verdict for the Defendant upon them all, with damages 1950*l.* and costs 40*s.*, subject to a reference as to the amount of the damages; which reference was subsequently waived by the Plaintiffs.

But the Counsel on the behalf of the Plaintiffs, upon his Lordship's dissenting from their view of the case, excepted to his opinion and direction, and at their request his Lordship put his seal to a bill of exceptions to the above effect tendered by them.

In the following Michaelmas Term judgment was signed for the Defendant upon all the issues, as well on the new assignment as on the pleas.

Upon this judgment the Plaintiffs brought a writ of error returnable in the Exchequer Chamber,

which Court, on the 17th day of May, 1828, affirmed the judgment of the Court of King's Bench. *

The writ of error was against the judgments of the King's Bench and of the Exchequer Chamber.

The case was argued † by *Martin* for the Plaintiffs in error, and by *J. Campbell* and *Maule* for the Defendants in error, in the presence of the Judges, to whom, at the conclusion of the argument, the following question was put : —

An action of trespass being brought against a sheriff and another person, for entering the Plaintiff's house and seizing and taking away his goods on divers days and times; the sheriff pleaded a justification under a writ of *fieri facias* issued against the goods of A. B. at the suit of the other Defendant, averring, that goods of A. B. were in the house, and that he entered the house to seize, and did seize, and sold them under the writ; the other Defendant pleaded the same plea, with the addition of the judgment recovered by himself against A. B. The Plaintiff replied, admitting the judgment and writ, and traversing the residue of the cause; and also added a new assignment, at other times and on other occasions, and for other purposes, and also alleging excess. At the trial it appeared that the sheriff had made a warrant

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* See 2 Yo. & Jerv. 304. 4 Bing. 729.

† In 1832. The principal arguments and authorities are noticed in the opinions of the Judges. To shew that there was no lien upon the goods, the Counsel for the Plaintiffs in error cited *Savile v. Champion*, 2 B. & A. 510.; *Hutton v. Bragg*, 7 Tau. 14., and *Raith v. Mitchell*, 4 Camp. 146. To this it was answered, that as the Plaintiff had possession of the vessel, he had a qualified possession of the cargo. The Year Books 21 H. 6. p. 5., 11 H. 4. 75 b., and 28 H. 6. 5 b., were cited on opposite sides upon the question, whether the intent of the party in executing the writ could be matter of issue.

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to his officers who entered the house, and continued therein until all the goods were removed, which occupied three or four days, and that the sheriff was indemnified by the other Defendant. Was it competent by law on these pleadings for the Plaintiff to shew at the trial, in maintenance of his action, that the acts of the Defendants were not really done under or in execution of the writ, but for another purpose under another claim, and that the writ, and the proceedings under it, were a mere colour and contrivance to get possession of the goods?

—
In June 1833, the Judges gave their opinions upon this question as follows : —

Bosanquet J. — In this case it appears that the new assignment may be laid out of consideration. The question, therefore, upon which my opinion turns is this : Whether the evidence in the case supposed relates to a material allegation contained in the plea, and denied by the replication?

The effect of the replication is to put in issue every material fact (except the judgment and writ of *fi. fa.*), which constitutes any part of the cause for which the Defendant alleges that he committed the acts professed to be justified. Whatever fact the Plaintiff might consistently with the rules of law have traversed separately, he denies by the general form of replication, which he is allowed to employ in such case as this.

It may be assumed that in the action, shortly described in your Lordships' question, the declaration would state, that the Defendant broke and entered the Plaintiff's house, seized and carried away his goods, and converted and disposed of them to his own use : and that the plea would profess to justify the entry of the house, and the

seizing, taking, and carrying away, and converting and disposing of the goods to the Defendant's use; and for that purpose would allege, that goods liable to be taken in execution under and by virtue of the writ and warrant to the bailiff, were in the house; that under and by virtue of the writ and warrant the bailiff entered the house, in order to seize and take, and did seize and take the goods in execution, and afterwards, and before the return of the writ, sold the goods, and by sale thereof made and levied a sum of money in satisfaction of the debt and damages: such is, in fact, the form of the pleadings in the case which was argued at your Lordships' bar. The plea further would profess to allege, by way of excuse for the entry, seizure, and conversion of the goods, that they were taken in execution, and a levy made thereof in satisfaction of a debt. If this allegation contain matter of fact, it is traversable; if it be merely a consequence of law, it is not traversable; and whether the evidence mentioned in the question, ought to be submitted to the jury, must depend, as it appears to me, upon this point, viz.: Whether the allegation is to be viewed in the one light or the other?

Whether the writ authorised the Defendants to do any particular act, alleged to have been done, is a matter of law, and cannot be traversed: but whether the Defendant actually did any particular act which they allege to have been done, is a matter of fact and may be denied.

It has been truly said, that if it be alleged that a particular act was done by virtue of a certain writ, the doing of such act, by virtue of the writ, is not traversable, because it is an inference of law; but if it be material to shew, whether the act itself was

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done or not, it will not be the less traversable, because it is alleged to have been done by virtue of a certain writ. It would not be competent to the Plaintiff to insist under the general denial contained in his replication, or under any more special traverse, that the writ in question did not authorise the bailiff to take in execution the goods of the debtor, and to seize and sell them in satisfaction of the debt, as they have alleged: but whether they did really take the goods in execution, and deal with them as alleged in the plea; or seized them for purposes foreign to the execution, and disposed of them in some manner, other than by way of sale in satisfaction of the debt, was, as it appears to me, a matter of fact put in issue by the replication, and to which the evidence in question was applicable.

In the case of *Beal v. Simpson*, 1 Ld. Raym. 411. *Powell J.* said he confessed, that generally the *virtute* of a writ is matter of inference of law only, and then not traversable, but matter of fact may depend upon it, and then it is traversable; as in that case the taking out of prison, and for that reason it was traversable. *Nevil* and *Blencowe* agreed with *Powell J.* that generally the *virtute cujus* is not to be traversed containing matter of law, but when it is mixed with fact there it may be traversed; and though *Treby C. J.* held that *virtute cujus* is not traversable in all cases, judgment was given for the Plaintiff, according to the general opinion of the Court.

The principal authorities relied upon by the Defendant, and supposed to bear most directly upon the subject, are *Dr. Groenvelt v. Dr. Burwell*, 1 L. Raym. 454., and *Crowther v. Ramsbottom*, 7. T. R. 654. But neither of those cases appear to me to

govern the present, notwithstanding the resemblance to it which they bear in several circumstances.

In the case of *Dr. Groenvelt v. Dr. Burwell*, the Plaintiff having complained of an assault and false imprisonment, which the Defendants justified under a judgment of the College of Physicians and warrant issued thereon, the Plaintiff, after protesting as to certain allegations of the plea, replied that the Defendants of their own wrong, assaulted and imprisoned him as before alleged, *and not by virtue* of the warrant supposed in the plea. Upon demurrer Lord *Holt* declared the opinion of the Court, that the replication was bad as well in matter as in form. He says, the Defendants shew that there was such a warrant, and that by virtue thereof the Plaintiff was arrested and imprisoned, to which the Plaintiff does not make answer, that there was not such a warrant nor traverses it, but only says he was not arrested *by virtue* of it. If he had denied that there was such a warrant, it had been a good traverse, for then the officer would not have been authorised to arrest the Plaintiff. He says, if the officer had *a good warrant at the time* of the arrest, though he had declared that he had arrested upon a warrant that was insufficient, yet in an action brought against the officer, he might have justified under the good warrant, having had it in his custody at the time of the arrest; and he compared the case to that of a man who distrains for one thing and avows for another; which undoubtedly he may do: and he held the traverse ill. It is evident that the objection here made to the traverse is, that as the warrant, the arrest and the imprisonment were admitted, the traverse that the arrest and imprisonment were made *by virtue* of

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the warrant was not allowable; neither the validity nor the effect of the warrant could be disputed under such a traverse: *traversat* (says the special demurrer) *virtutem warranti quæ non est traversabilis existens validitas et materia legis*; and if the Defendants only did that which they alleged in their plea that they had done by virtue of the warrant, the denial that the Defendants committed assault and imprisonment by virtue of the warrant amounted to no more than saying, that although the Defendants were in possession of a warrant, the sufficiency of which to justify those acts the Plaintiff was not in a condition to dispute as a matter of law, the Defendants at the time of the act done had assigned a different reason for their conduct.

Inasmuch, therefore, as this circumstance would afford no answer to the Defendant's justification, the traverse founded upon it was not material.

Such also appears to have been the point professedly decided in the case of *Crowther v. Ramsbottom*. The action was brought for seizing and taking cattle, and the Defendant justified under a writ of Justicies out of the Chancery of the county palatine of Lancaster, and a precept from the sheriff, commanding the Defendant to attach the Plaintiff by his goods to compel his appearance, and alleged that the cattle were taken for that purpose, and that the Plaintiff having appeared, the cattle were redelivered. The Plaintiff, admitting the writ, replied *De injuriâ et absque residuo causæ*, as in the present case. At the trial evidence was adduced to shew that the object in *executing the writ* was not to compel an appearance; but to enforce payment of a debt and the costs: and the

Judge left it to the jury to say, whether the Defendants entered for the mere purpose of compelling appearance, or for the purpose of compelling the Plaintiff to pay a debt and costs. Lord *Kenyon*, in delivering his opinion upon a motion for a new trial, said, “ I never understood that a man was obliged
 “ to justify a distress for the cause which he hap-
 “ pened to assign at the time it was made. If he
 “ can shew that he had a legal justification for
 “ what he did, that is sufficient. A man may dis-
 “ train for rent and avow for heriot service. Now
 “ here it appears, that the Defendants were jus-
 “ tified under the process of the Chancery Court
 “ in entering on the Plaintiff, and taking his goods
 “ in order to compel appearance, and, therefore,
 “ the question ought not to have been left to the
 “ jury to say, whether they entered for that or
 “ some other cause. As to the excess, he said that
 “ is a subject of an action on the case.”

Mr. Justice *Lawrence* quoted *Groenvelt's* case as directly in point.

It may be admitted, that the object and motive with which the process of the law is put in execution are not the subjects of traverse, nor consequently of evidence under the replication *de injuriâ*, &c. *absque tali causâ*; and to this extent, and to this only, do the cases cited appear to me necessarily to go. It frequently appears that the real object of arresting a Defendant upon mesne process is not to compel appearance to an action, but to procure immediate payment of a debt by the pressure of an arrest; but if nothing more be done than is required by the exigency of the writ, the act will be justified, whatever be the motive of the party, or the cause which leads him to employ the process of the law.

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In the case put by your Lordships, the evidence points not merely to the object and purpose of doing particular acts, but to the nature of the acts done, in order to ascertain, whether they correspond with the description of them in the plea, which alleges not merely a taking by virtue of the writ of execution, but a sale and levy in satisfaction of a debt.

The case, as it appears, stands thus:—


The Defendant by way of excuse alleges that he has done various acts, all of which, if done, would be authorised by the writ, and which taken jointly would afford a good defence to the Plaintiff's whole complaint, but taken partially would not. The Plaintiff admitting the writ, denies the rest of the cause; and offers evidence to shew that part of the Defendant's acts were quite of a different character from those described in the plea. By this evidence the effect of the writ is not impeached, but only the execution of it in fact; and unless it was executed in fact as alleged, the defence must fail.

The materiality of this consideration may be illustrated by supposing the following case: goods were shipped abroad to be delivered in England. By the charter-party, freight for carriage of the goods is made payable within a limited time, suppose ten or fourteen days after the delivery of the goods, and by the bill of lading the goods are to be delivered to the shippers or their order, paying freight according to the charter-party. In such case the goods would be deliverable to the order of the shipper before the freight for carriage of the goods became payable. It might, therefore, be insisted by the consignees, that at the time of

the delivery of the goods no lien had attached, the times for delivering the goods and for payment of the freight not being contemporaneous; yet if the consignees claimed the goods, as holders of the bill of lading, they would by taking under the bill of lading become liable to perform the condition of it, and to pay freight at the expiration of the stipulated time. “For if a person accepts any thing which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself.” *Abbott on Shipping*, p. 286. ed. 5.

In this state of things, therefore, if the consignees in the character of execution creditors could get the goods out of the possession of the ship owner before the freight had become due, without resorting to the bill of lading, they might refuse to pay the freight, and leave the ship owner to his remedy against an insolvent shipper. It would therefore become an important question, whether the goods were really taken and sold by the sheriff by way of levy for a debt in execution, or whether the writ of execution was not employed as the means only of getting the goods into the possession of the consignees to be dealt with by them as they should think fit, under the consignment, without the bill of lading. As consignees they could have no right to the possession without claiming under the bill of lading; and as execution creditors they could not justify taking possession, except for the purpose of levying their debt by the hands of the sheriff.

Much embarrassment seems to have arisen in

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this case from the use of the word “purpose.” What was the purpose of levying an execution on the goods is one question, and whether the goods were disposed of for the purpose of levying an execution upon them is another and very different question. The first assumes an execution to have been executed; the other raises the issue, whether an execution was executed or not. If there was a real execution in this case, the allegation in the plea was maintained; if there was no such execution, it failed.

The ground, therefore, upon which my answer to your Lordships’ question is founded, is that the evidence therein mentioned tended to shew that the act done by the Defendants was not the act alleged in their plea, as part of their excuse, viz. an execution by levy upon the goods, but an act of a different character.

For these reasons I am of opinion, that it was competent by law on the pleadings mentioned in your Lordships’ question for the Plaintiff to shew at the trial in maintenance of his action, that the acts of the Defendants were not really done under or in execution of the writ; but under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods.

J. Parke J. — To the question submitted by your Lordships to his Majesty’s Judges, I answer that, in my opinion, it was not competent to the Plaintiff, upon these pleadings, to give in evidence “that the act of the Defendants was not really
“done in execution of the writ, but for another
“purpose, under another claim; and that the

“ writ and proceedings under it were a mere
 “ colour and contrivance to get possession of the
 “ goods.”

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One plea states a judgment, and both a writ of execution against the goods of A. B., the delivery to the sheriff of that writ, that there were goods of A. B. in the place where the trespasses were committed, and that the Defendants were entitled to seize and did seize and sell the goods under the writ. There is an admission of the judgment and writs in the replication, and a traverse of the residue of the cause. There is also a new assignment of trespasses at other times and on other occasions, and for other and different purposes, and also alleging excess. And the question is, whether the above evidence was admissible either on the traverse of the residue of the cause, or the new assignment.

I propose to consider these two parts of the question in an inverse order, for there is no difficulty about one, and the other requires further consideration.


First then, with respect to the new assignment. It is clear that the office of a new assignment is to correct a mistake occasioned by the generality of the declaration, and to explain that the Plaintiff is proceeding for a different cause of action from that mentioned in and justified by the plea: it admits that the trespasses intended by the plea are not those for which he seeks redress. If the Plaintiff is seeking to recover for the trespass mentioned in the plea, and justified by it, he must reply, and either traverse, or confess and avoid the matter of the plea. Now in this case the Plaintiff is, in truth, as appears from the evidence offered, in-

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sisting that the same acts attempted to be justified by the plea were not justified by it. The evidence applies to the acts mentioned in the plea, and not other and different acts on another and different occasions.

But it has been contended, that the new assignment may be treated as if, after traversing the matters in the plea, it has gone on to aver that the trespasses mentioned in the plea were done *for other and different* purposes than those in the plea mentioned; and that under such a new assignment it is clear that the evidence would have been admissible, and that such a new assignment might indeed be demurrable; but that not having been demurred to, the evidence may be given under it. To this I answer, that the new assignment does not contain any averment that the trespasses mentioned in the plea were done for other and different purposes: if it had, it would have been bad on demurrer to so much of the new assignment; and if it had contained that averment alone, viz. that all the trespasses in the plea were committed for a different purpose, it would have been bad altogether, for then the replication and new assignment would have contained two answers to the same trespass mentioned in the plea; one a denial of the truth of the several matters comprised in the traverse *absque residuo*, &c., another that the same trespasses were done for other purposes; and it was on this ground that the replication and new assignment were held to be bad in the case of *Cheasley v. Barnes*, 10 East, 78., besides its being objectionable on another ground, which I propose to consider afterwards, viz. that the purpose could not be enquired into at all.



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If there had been a demurrer to *this* new assignment the answer would have been that the Plaintiff meant, as he had a right to do under that declaration, to insist on other trespasses committed at other times and unconnected with the writ of execution, and not those attempted to be justified, and to apply the declaration which contains an averment of trespasses committed on several days and times to such other trespasses; and such answer would have been a good one. The new assignment would, therefore, have been good on demurrer; and as the Defendants must necessarily have the power of objecting at some time, it follows that it was open for them to contend on trial that the Plaintiff had no right to give in evidence under this new assignment, that the traverse justified by the plea, as having been made by virtue of the writ, was made for a different purpose, that that was the first time at which it was competent for them to take the objection. It is also true that the part of the new assignment which goes to excess is inapplicable to the evidence adduced, the excess alleged appearing by the record to be the use of excessive and unnecessary force and violence. It is clear, therefore, as it seems to me, that the new assignment will not authorise the exclusion of the proposed evidence; and it is to be observed, that it was on the ground of the new assignment only that the Court of Exchequer decided that such evidence was admissible in the present case, as reported in 4 Bingham, 729. The question, therefore, is reduced to this,—whether the general traverse of the residue of the evidence is admissible. This replication supports the judgment and the writ, and, therefore, I

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conceive it to be clear that the party so admitting cannot say there was, in point of law, no judgment and no writ. If by the terms "colour and contrivance," in the question submitted by your Lordships, it is meant to be suggested that these were fraudulent and void, and supposing even that the sheriff was a party to the fraud (which the evidence offered does not prove,) I conceive that such fraud should have been replied specially in avoidance of the judgment or writ. Supposing then the judgment and writ to be valid, which I think the pleadings admit, the question is, whether, upon this traverse, the Plaintiff can be permitted to shew that the Defendants did not enter under the writ, and in execution of it, but that they entered nominally under the writ, but in reality under a different claim. This is a question of some nicety and difficulty; but upon the best opinion I can form, I must say, that it appears to me that they cannot; and that there should have been a special replication in order to have enabled him to have done so.

The plea, as stated in the question proposed by your Lordships, does not merely justify the taking of the Plaintiff's goods, nor does the plea in the case argued at your Lordships' bar: but it goes on to state that the goods of A. B., which were taken, were sold, and the plea upon the record in this case also states that part of the money was levied by the sale of the goods, and paid over to the execution Plaintiff. In order to make the question clearer, I shall consider how it would have been if the plea had not stated the sale of the goods, and afterwards, whether the introduction of that averment makes any difference. Supposing

the plea to have done no more than state the judgment, the writ, the delivery to the sheriff, that there were goods in the house liable to be taken under the execution, and that the Defendants entered the house to seize and did seize the goods under the writ; the question is, what the traverse *absque residuo causæ* puts in issue? It certainly puts in issue the delivery of the writ to the sheriff before the seizure: the existence of goods of A. B. in the house liable to be seized under the execution at the time of the entry, and, in this case, it may be the seizure also. But does it put in issue the intention and purpose which the Defendants had in making the entry. This is precisely the same question which would have arisen if the delivery of the writ and the existence of the goods in the house had been admitted, and the replication had traversed without any special inducement, the entry so made under and by virtue of the writ.

Now I take it to be perfectly clear and settled law, that if a man has a legal authority by writs or otherwise to do all that he does, it is quite immaterial whether he intends to use that authority or not, or even declares that he does not intend to use it. If he is authorised by a writ or in any way to do a particular thing, and he does it in the manner in which he is authorised to do, he does it by authority of the writ, or which is the same thing, *under, and by virtue, or by force of the writ*. One of the earliest authorities is in Fitzherbert, "Avowry, 232," if a man take a distress for one thing, still when he comes and pleads, he may aver for whatever thing he pleases; and in *Groenvelt v. Burwell*, 1 Lord Raymond, 465., Lord Holt refers

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to this case, and says the single question is whether he had good authority at the time of the arrest? As if a man distrain his tenant for that which he cannot justify, but at the same time rent is in arrear, he may avow for the rent in *arrere*, and he is not obliged to avow for that for which he took the distress, nor can the plaintiff traverse the taking for the rent in *arrere*, but can only plead in bar to the avowry, *riens in arrere*, so he says, referring to the particular case, “the plaintiff cannot say that he did not take him by virtue of the good warrant, for if he had such a warrant in his custody at the time of the arrest, he was arrested by it.” So in the same case, 12 Mod. 386, Lord Holt says, “it is not what he declares, but the authority which he has which is his justification,” and in Comyns’ Report, 78, S. C. In *Crowther v. Ramsbottom*, 3 T. R. 657, Lord Kenyon lays down the same rule. “I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time when it was levied.” If he can shew that he had a legal justification for what he did, that is sufficient. “A man may distrain for rent, and avow for heriot service.” He goes on to say, “Now here it appears that the defendant was justified under the process of the County Court in entering on the plaintiff and taking his goods, in order to compel an appearance; and therefore the question ought not to have been left to the jury to say whether they entered for that or for some other cause,” and Lawrence, J. gave the same opinion. It is to be remarked that in this case there was the clearest evidence that the defendant entered not for the purpose of distraining

to compel an appearance, but to compel the payment of the debt under colour of process. It even appeared that he kept the goods seized for four days after the tender of the appearance money, and yet it was held that the replication admitting the writ, and traversing the residue of the cause, did not put in issue the question whether the goods were seized “by virtue of the precept.”

It appears to me, therefore, that these authorities clearly establish the general proposition, that if a man is authorised by law to do the act which he does, he is justified in doing it, whatever his object or intention may be at the time he does it; and therefore where a sheriff has a writ authorising the seizure of certain goods, and he seizes those goods, he has a right to say, in point of law, that he seized under the writ.

But it is contended that there are authorities which shew that an averment that a fact was done by virtue of a writ, or in technical language a “*virtute cujus*,” is traversable, and that therefore it might properly be put in issue in this case. And it is true that there are such authorities; but they are all cases in which the traverse included some matter of fact, or in which the question raised by it was whether the writ really authorised the act, and not what the intention or purpose of the party having the writ was. And in all of those cases the inducement to the traverse shewed that the meaning of it was not to put in issue a matter of law, but the question of fact, whether these circumstances existed which were necessary to make the writ a sufficient authority to do the act justified.

Thus in *Beale v. Simpson*, the principal authority on this subject, 1 *Lord Raymond*, 408., which was

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an action against a bailiff of a liberty for an escape, the plea was that the debtor was carried from the prison of the liberty to Westminster, under a *habeas corpus* issued in Hilary and returnable in Trinity Term, and delivered to the defendant before the escape. The replication pleads by way of inducement, that another *habeas corpus* was issued in Hilary returnable in Easter, and after the return of that writ, and not before, the debtor was taken out of prison and brought to Westminster, and then the defendant by covin procured another writ, tested before and returnable in Trinity Term, which was delivered to the defendant after the debtor was so brought, and not before, by virtue of which last writ the debtor was brought into court and then committed to the Fleet, and concluded with a traverse without this, that the defendant by virtue of the writ in the plea mentioned, took the body of the debtor out of the prison of the liberty, and carried him to Westminster, as averred in the plea. Now the majority of the judges in this case were of opinion that the traverse was good, as it involved matter of fact, and Powell mentions the removal from prison as one fact: Treby, C. J. *contra*: but it does not involve the question of the intention of the defendant when he removed the debtor; it involves the question whether the debtor was taken from the prison, and also the question whether the writ in the plea mentioned, really did authorise the removal, and it did not certainly if it was issued and delivered to the sheriff after the removal. In the case put by Powell J. the same observation applies. The case is this:—If two writs be delivered to the sheriff against A. one at the suit of B., returnable

first return of Hilary, another at the suit of D., returnable the last return of the same Term, and D. procures a warrant on his writ, upon which A. is arrested after the return of B.'s writ, and then gives a bail bond for his appearance, and in a suit upon this bail bond A. pleads that he was arrested upon the writ of B., returnable the first return of the Term, and that he gave the said bail bond after the return of the writ, by which it was void. The sheriff replies the other writ at the suit of D., and that A. was arrested, and, *absque hoc*, the arrest was by virtue of the writ of B., there it is clear that B.'s writ did not authorise the arrest at the time it was made, and the taking of the bail bond.

In *Foster v. Jackson*, Hob. 52, where the plea to a *scire facias* on a judgment against executors, was that the original defendant was taken by the sheriff by force of a *capias ad satisfaciendum*, the replication was, that the sheriff did not take by virtue of the *capias ad satisfaciendum*, it is clear that the taking is involved, and probably also the existence of the writ itself, as well as its delivery to the sheriff, and besides the question there arose not on demurrer to the replication, but after verdict. In the case of *Bennett v. Filkins*, 1 Saunders, the traverse, however, (which was objected by Saunders,) is good on the same ground.

The result of these authorities is, that the "*virtute cujus*" may be traversed where it involves matters of fact: and the question whether the writ did or not authorise a particular act, that is whether those circumstances existed which gave it authority; but it is not where it involves a mere matter of law, and if a man has the authority of a writ, and does the act authorised and no more, it

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is a matter of law that he is justified in the act, whatever the intention may be. If, indeed, the authority of the writ be not pursued, but some act be done by the party who has it, inconsistent with its authority and an abuse of it, then the law adjudges by the subsequent act, *quo animo*, the party did the thing complained of, and the defendant will derive no justification from the authority which he had. *Six Carpenters' Case*, 8 Coke, 146 a.; but it is to acts done, and not to declarations and intentions, that the law looks, Lord Coke, 3, Coke, 26, a., “for the law doth respect deeds, but “ words without an act are not in this case regarded “ by the law; and then instances a case of a distress “ for one thing and avowing for another.”

But it is quite clear that all acts done which make the party unjustifiable under the authority of the law, and a trespasser, *ab initio*, cannot be given in evidence under the general traverse, but must be specially replied. 1 *Saunders*, 300, d. (n.,) *Dye v. Leatherdale*, 3 *Wilson*, 20.; *Taylor v. Cole*, 3 T. R. 292.; 1 H. B. 555.; *Gundry v. Feltham*, 1 T. R. 338. If acts done by which the *intention* of the party is less unequivocally demonstrated, cannot be given in evidence under the general traverse, why should other more equivocal proofs of the intention from declarations be admissible? In truth, looking by way of illustration to the evidence offered on the trial, which appears on the bill of exceptions in the case itself, the strength of the case is that the goods were delivered over to Hopley and Lingham, the execution creditors, by the defendant, the sheriff. This is an act done, which is the strong, and, indeed, the only evidence of the defendant's intent and purpose; and surely this, upon the sup-

position of the state of the pleadings on which I have been arguing, is matter which should have been replied. For the reasons I have above given, I conceive it to be clear that a man, whatever his purpose may be in acting according to the authority of a writ, is justified by it, if *he acts according to it*; but if he does an *act* inconsistent with its authority, he is no longer justified by it, but is either a trespasser *ab initio*, or is liable to another action, according to the nature of the inconsistent act so done. In the present instance, therefore, if the plaintiff had replied that the goods were delivered up by the sheriff, it would have been a good answer, but it is no answer as a proof of the *intention* of the defendants under the general traverse.

I have so far argued the case on the supposition that the plea justified the trespass as to the house, by the statement of the writ, and delivery to the sheriff and seizure of goods in the house, liable to the execution, and omitted all mention of the subsequent sale or levy, and payment to the execution plaintiff.

The next question is whether the averment of the sale, or of the levy, or both, make any difference. Now it is to be observed that the plea does not justify seizing the plaintiff's goods, but only the entry into the plaintiff's house, and the question is, whether the unnecessary averment that the goods had been sold, &c. is involved in the issue that the defendant committed the trespasses without the residue of the cause alleged in the plea. I take it to be clear that the plea need have stated no more, and that if it had omitted to state that the goods had been sold, it would have made no

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difference; and it is a general rule in pleading, that an unnecessary averment, if capable of being separated without injury to the sense, need not be proved. That so much of this plea as relates to the sale and levy may be so separated admits of no doubt. Suppose that under these pleadings, the defendants had never sold at all, but having legally entered and seized in order to execute the writ, they had kept the goods unsold for want of buyers; would not the defendants have been entitled to a verdict? and if so, it must be on the ground that the statement as to the sale is immaterial and may be rejected. I think, therefore, that the averment of the sale in this case is immaterial.

But it is not the question proposed by your lordships, whether it was necessary under these pleadings to prove the sale of the goods and payment of the money, the question is a different one; and I feel satisfied that it was incompetent for the plaintiff, upon the pleadings stated in your lordships' question, to give evidence that the acts of the defendants were not really done under and by virtue of the writ, but for another purpose, under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods.

Gaselee, J. — Having attentively considered the question put by your Lordships to the Judges in this case, I continue of the opinion in which I concurred in the Court below, that it was competent by law on these pleadings for the plaintiff to shew at the trial, in maintenance of this action, that the acts of the defendant were not really done under the execution of the writ, but for

another purpose under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods.

The difference between this case and those of *Groenvelt v. Burwell* and *Crowther v. Ramsbottom*, which are principally relied on by the plaintiffs in error, is so fully stated by the late Lord Chief Justice of the Court of Common Pleas in giving the unanimous judgment of the Court of Exchequer Chamber, and by some of my learned brothers to your lordships on this occasion, that it would be an unnecessary waste of time to go over them again at any length. The main difference is, that in those cases, what the defendants in their pleas professed to have done they had done. Here it is not so. They have not executed the writ; they have not made the debt of the goods and paid it over to the creditors; but have delivered over the goods themselves, not in satisfaction of the debt as directed by the writ, but to the importers claiming under a bill of lading, and seeking to avoid any question of the payment of freight, or any other charge upon which any question might arise. This, I am inclined to think, also satisfies the new assignment. But it is said it was not competent to the plaintiff below to reply, and also to new assign, because, it is alleged, there is only one trespass in the declaration, and for this is cited the case of *Cheasley v. Barnes**; upon referring, however, to the statement of the declaration in the question put by your lordships, and also to that contained in the bill of exceptions, the trespasses are, in both, charged to have been com-

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mitted *diversis diebus et vicibus*, in which case it is admitted the defendant may reply and new assign; and although the precise terms of the new assignment are not stated, enough of it is set out to shew that it states the plaintiff to have brought his action not only for the trespasses in the pleas mentioned, and thereby attempted to be justified, but also for that the defendant committed trespasses at other times, and on other occasions, and for other purposes, under which, supposing it to be held that the seizing the goods is justified under the pleas, they afterwards delivered them over to the defendants, below instead of making the debt of them, and paying the money over to the creditors; and this may be given in evidence: but admitting it to have been wrong to have replied, and also new assigned, it seems to me, that as the defendants below have not demurred, it is now too late to take advantage of the duplicity. If I am at all right as to the first point, the question as to the new assignment is immaterial.

Littledale J.— On first considering the question stated by your lordships for the opinion of the Judges, I felt a difficulty in giving an answer to it. The action is brought for breaking and entering the plaintiff's house, and taking his goods, and the justification is under a writ of *feri facias* to take the goods of A. B. Generally speaking, the Plaintiff's goods could not be taken under an execution against the goods of A. B. But I must assume that the plaintiff has something to do with the goods in such a way as that they may be called his goods, and also that the property of the goods is in A. B., and that they are liable to be

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taken in execution absolutely, because, if the plaintiff had such an interest in them as that they could not be taken in execution absolutely, but only subject to a claim which he might have either by the goods being let to him, or pledged or pawned with him, or by having a lien upon them; then, though the goods might be seized *pro formâ*, they could not be removed, and the defendant's plea of justification would fail altogether. On the other hand, if the goods were the property of A. B. liable to be taken in execution, the plaintiff would appear to have nothing but the possession of the goods, and could not maintain an action against persons who stand in the place of the owner of the goods, and the sheriff might justify entering the plaintiff's house to take the goods.

But laying aside these considerations, the first point I notice is the allegation of excess. It does not appear that any excess has been proved, and it forms no part of your lordships' question.

The next point I notice is how far the new assignment bears upon the case: and as to that, I think a new assignment is not applicable to it. In case of a *single* trespass in the declaration, and a plea justifying it, the plaintiff cannot both reply and new assign, as that would be giving a double answer to the plea. *Cheasley v. Barnes*, 10 East, 73.; *Franks v. Morris*, in the notes to that case, 81., and *Taylor v. Smith*, 7 Taunt. 156. But in the present case the trespass is laid on divers days and times, and therefore both in point of form as to the pleading, the Plaintiff might new assign, and might also at the trial give in evidence trespasses committed on other occasions, and for other purposes, than are alleged in the plea. Now the occasions

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and purposes mentioned in the plea are the acts done in executing the writ of *fiery facias*, and upon a denial and traverse of the facts stated in the plea, the plaintiff may shew that the defendants did not do the acts complained of in executing the *fiery facias*, for that is part of the issue raised by the replication. What the plaintiff would propose to give in evidence under the new assignment of other occasions and for other purposes than there is mentioned in the plea, is, that the acts of the defendants were not really done in execution of the writ, but for another purpose and under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods. It appears to me that that is the same thing as the traverse raised by the replication, and more properly raised on that than by making a new assignment. *Oakley v. Davies*, 16 East, 82. In fact, the whole is one act, and may be treated as one trespass, though different things were done on different days. I think, therefore, that the plaintiff could not maintain his action by resorting to the new assignment, and in answer to your lordships' question, as far as arise upon the plea and replication, I think that if the evidence was to prove that the goods were never seized in execution at all, then the plaintiff might shew that the acts of the defendants were not really done under or in execution of the writ, but for another purpose under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get the possession of the goods. But if the goods were once actually taken in execution, then I think that evidence would not be admissible to shew that the acts done by th

defendants were done for another purpose and to enforce another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods.


With regard to the first part of what I have stated as my opinion, I presume, though your lordships' question does not so state, that the plea alleges the goods in the plaintiff's house were liable to be taken in execution, and that such was the fact. And then the other material allegation in the plea, which falls under the general traverse without the residue of the cause, is, whether they were taken under the writ, and that, I think, is a material part of the traverse. At common law the *fieri facias* had relation to the *teste*, and bound the defendant's goods from that time, so that if the defendant had sold the goods, they were liable to be seized in execution. This was altered by the Statute of Frauds, which enacted that the property should be bound from the time of the delivery of the writ to the sheriff. The meaning of that is, that after such delivery, if the defendant make an assignment of the goods the sheriff may take them in execution. But neither before nor since is the property of the goods altered, but continues in the defendant till execution executed.

But it has been argued that the "*virtute cujus*" is not traversable, and I admit that where these words, "*per quod*," &c., introduce a consequence or inference from the preceding matter, they are not traversable, but that the preceding matter alone is so. Many cases are referred to as to that position in the notes to 1 Williams, Saunders, page 23. In the case of *Bennett v. Filkins**, Saun-

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* 1 Saund. 20.

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ders, who was counsel for the defendant, thought that the Plaintiff would have objected to the traverse, because it was without this that Kingswell was in prison by virtue of the warrant, and he said *by virtue* ought not to be traversed. , And so, also in *Green v. Jones*, 1 Saund. 298, where the defendant had shewn that a Bill of Middlesex was sued out *per quod*, the sheriff made his warrant, &c., so he has not alleged anything traversable except the *per quod*. And the court seem to have thought that the *per quod* was not traversable; and in the report of this case, in 2 Keble, 607, the court argued that *virtute cujus* is not traversable, but only the issuing the writ, or that he had no warrant.

In *Beale v. Simpson*, 1 Lord Raymond, 410., Treby, Ch. J. refers to this case of *Green v. Jones*, as having decided that a *per quod*, or a *virtute cujus*, is not traversable. And he adds, “when one
 “ says that such a thing has been done by virtue of
 “ a writ, it is meant by authority of the said writ, by
 “ operation of law without any ingredient or men-
 “ tion of matter of fact, and a mere matter of law is
 “ not to be traversed and tried by a jury :” and he afterwards adds, “the *per quod*, *prætextu*, or *vigore*
 “ *cujus*, introduce a consequence of law only from
 “ the matters of fact before stated ;” and then he refers to several authorities which are stated in the report, where it is agreed that the *virtute cujus* never introduces any new matter, but only collects the matter before. Nevill and Blencowe, Justices, agreed with Powell, Justice, who had before delivered his opinion, that generally *virtute cujus* is not to be traversed containing matter of law, but when it is mixed with fact, then it may be tra-

versed. And in that case these three Judges held the opinion of Treby, Ch. J. that the taking the prisoner was traversable.

In *Foster v. Jackson*, Hob. 52., the traverse was allowed, but that was after verdict, and therefore does not so much bear upon the point. In *Gronvelt v. the College of Physicians*, 12 Mod. 386., 1 Lord Raymond, 454., Comyn's Report, 76., the traverse was that the Plaintiff was not arrested by virtue of the warrant stated in the plea. That traverse was held bad.

The case of *Beale v. Simpson* appears to me to unravel the whole of the difficulty as to the *virtute cujus*, and similar passages, not being traversable, that the reason is that it only collects the matter alleged before, and draws a conclusion from it, and then, being matter of law, it is not traversable. But where it is mixed with matter of fact, there it is traversable. Now, in the present case, if the law was that goods are to be considered as taken in execution by the mere delivery of the writ to the sheriff, then I certainly agree that the allegation by virtue whereof the sheriff seized the goods in execution, would be an inference of law, and therefore not traversable; but as I am of opinion that the delivery of the writ to the sheriff does not of itself constitute a taking the goods in execution, I think the seizure of the goods by virtue of the writ is not a matter of law, but is a matter of fact whether the sheriff seized by virtue of the writ or not, and therefore traversable. I may remark, that if any particular technical effect is to be given to the words "*by virtue whereof*," they are not a necessary allegation in the plea, and may be treated as surplusage. It would be sufficient to allege

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that after the making the warrant the bailiffs took the goods in execution. This expression, however, although it avoids the "*virtute cujus*," comes really to the same thing; and the point in this part of the argument is, in effect, whether the delivery of the writ to the sheriff, in point of law, amounts to a seizure of the goods in execution, so as to say that the traverse of the seizure in execution, or under the writ, or similar language, is a matter of law. If not, then it is a matter of fact, and traversable.


On the second point, my opinion is, that, if there was ever an actual seizure that was an execution executed, and the evidence in your Lordships' question was not admissible, I do not think it can be inquired into what motive the Defendant had in suing out the writ. If there was a valid debt and judgment, he had a right to sue out a writ of execution, and though his object might be by means of that to get possession of the goods which he could not otherwise so easily have done, and thereby to acquire some benefit to himself which he would not have had but for the writ, I do not know why he cannot make use of a lawful proceeding to acquire that advantage; and that such motive and object are not inquireable into, sufficiently appears from *Crowther v. Ramsbottom* (in which I certainly concur), if the writ be once executed. The nature and object of the other purpose, and the claim is not stated in your Lordships' question, and I am not at liberty to refer to the bill of exceptions, but must confine myself to the questions submitted to the Judges; but it does not appear from the questions that the ulterior object he had in view was unlawful; and therefore, if he executes a lawful act, and it does not appear

that his ulterior object was for an unlawful purpose, the only detriment that the Plaintiff could sustain is, that the Defendant has a better means of enforcing his claim, and I do not see what damage in point of law the Plaintiff has sustained.

But then, it is said, that, although the mere delivery of the writ to the sheriff may not amount to execution of the writ, yet that if the same person who is sheriff seizes the goods for quite a different cause from any thing connected with the writ, and which he shews to be different both by his words and acts, yet nevertheless that is in point of law a seizure under the writ, and if an action of trespass be brought against him for the seizure, he may treat that seizure as a seizure under the writ, and justify accordingly, and several cases are cited which it is said shew the law to be, that if a man has two authorities to take goods, and he takes professedly under one, he may afterwards justify in trespass, or avow for the other. In *Butler and Baker's* case, in 3 Coke, 26. a, it is said, that if a man takes a distress for one thing, yet, when he comes into a court of record, he may avow for what thing he pleases; for which is cited Fitzherbert's Abridgment, Avowry, 232.; and so in an anonymous case, in 2 Leon. 196., A. distrains, and being asked for what cause he distrains, he assigns a cause which is not sufficient, and afterwards an action is brought against him: he may avow the distress for another cause. In *Groenvelt v. College of Physicians*, 12 Mod. 386., 1 Lord Raym. 454., Comyn's Report, 76., it was said by Lord Holt, in giving the judgment of the Court, "Suppose one has a legal and an illegal warrant, and enter by virtue of the illegal warrant; yet he may justify

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“ by virtue of the legal one, for it is not by what
 “ he delivers, but the authority which he has is his
 “ justification.” And then he goes on with what I
 have above mentioned from 3 Coke, 26. a, as to
 the distraining for one thing and avowing for
 another. In *Crowther v. Ramsbottom*, 7 T. R. 654.,
 Lord Kenyon repeats what I have before men-
 tioned as to distraining for one thing and avowing
 for another, and he adds, that it appears the De-
 fendant was justified under the process of the Con-
 sistory Court in entering upon the Plaintiff and
 taking his goods in order to compel an appearance,
 and therefore the question ought not to have been
 left to the jury, to say whether they entered for
 that, or some other cause; and Mr. Justice Law-
 rence quotes what I have above mentioned from
 Lord Holt, and adds, it was not essential to enquire
 what the Defendants said when they entered and
 seized, but only whether they had in fact a legal
 warrant to justify them.

These authorities, beginning with Fitzherbert,
 are continued down to Lord Coke and Leonard's
 Reports, and further continued to more modern
 times, as reported in *Groenvelt v. College of Phy-*
sicians, and again recognized and confirmed in
Crowther v. Ramsbottom; and I must either sub-
 scribe to the doctrine established by those autho-
 rities, or say they are not law, or distinguish
 them so as to be reconciled to the opinion I am
 now delivering. I think that these cases are law
 but that a distinction may be taken, and that the
 rule should be confined to those cases where the
 seizure had been made under the process of the
 law, and that where a man seizes goods having
 two rights of seizure of goods, or of the person

either under the process of courts, or by distress as to goods, he may be taken to have seized or imprisoned under all the different authorities which he has at the time; and when he comes to justify in trespass, or avow in replevin, he may use whichever of the authorities he thinks proper; and that rule would reconcile all the cases as to distraining for one cause and avowing for another. And so also in *Groenvelt v. the College of Physicians*, the rule laid down may well apply, because if a sheriff has a man in custody at all, he is, as a matter of law, in his custody in all actions in which the sheriff has any process of detainer against the person; and therefore if he be in custody by operation of law, the sheriff may justify under any process which he has against the party; and it is quite evident from what is said in giving judgment in that case, that there was another writ or warrant besides that which was the subject of the traverse; and it is quite evident from the reasoning and the grounds of the judgment in *Groenvelt v. the College of Physicians*, that there were two warrants against the Plaintiff; and in all these cases lastly referred to, that there were two authorities, and therefore that they fall within the intention of the rule, I have pointed out.

In *Crowther v. Ramsbottom*, however, there was only one authority, and yet Lord Kenyon and Mr. Justice Lawrence nevertheless apply the same rule of law; but then, in that case, it is quite clear that there was a seizure under the process of the Court, and that process was executed, and therefore that the verdict was wrong, and there ought to have been a new trial: and it very well might be, that, if the officer seized under the writ,

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it should not be enquired into what his object was, whether to compel an appearance, or to compel the Plaintiff to pay the debt and costs. If he ever executed the writ, the law would say what was the effect of that, and it was not competent to enquire what his object or motive was in executing it. That case may in a certain degree appear to militate against my opinion; but that opinion is only that the proposed evidence is admissible to shew, in fact, whether the goods were seized under the writ or not. That was not the point there, which appears to be as to the object he had in view when he executed the writ.

I may here notice, that several cases have occurred where two writs of *fiery facias* have been delivered to the sheriff at the suit of different Plaintiffs at different times, and the sheriff has seized under the second writ first, and questions have arisen as to the right of the Plaintiff under the first writ to priority, and as to the liability of the sheriff: as *Smallcomb v. Buckingham*, 1 Lord Raymond, 251.; *Hutchinson v. Johnston*, 1 Term Rep. 729.; *Rybot v. Peckham*, in the notes to the last case; *Payne v. Drew*, 4 East, 523.; *Jones v. Atherton*, 7 Taunt. 56., 2 Marshall, 375.; in which last case Gibbs Ch. J. says the writ which first comes to the sheriff's hands must have priority which shews that the second writ is to be considered as operating in favour of the first, and that when the sheriff has a writ in his office, though a warrant on it, if he afterwards get possession by any other means, professedly, perhaps, under another writ, he must be taken to hold them under the former. In all these cases there was an actual seizure under one writ or the other, although in

ment, it was competent to the Plaintiff to give it. If the evidence offered is to be considered as confessing all the material facts stated in the plea, and introducing new facts in avoidance of the justification which the plea would otherwise afford, it certainly ought not to have been admitted upon the traverse.

We must see, therefore, what are the material facts stated in justification, what, in the language of the traverse, is "*the cause*" alleged by the Defendants for the trespasses they profess to justify. The trespasses the Defendants profess to justify are, the entry into the house and the seizing of the goods; and the grounds upon which the sheriff professes to justify them is, that he had a writ commanding him to cause to be made of the goods and chattels of A. B. a certain sum of money; that there were goods of A. B. in the Plaintiff's house; and that thereupon, the Defendant under and by virtue of the writ, entered the house to seize them, and did seize and sell them. The other Defendant states that he had a judgment upon which that writ of *fieri facias* was founded.

Now what are the material facts alleged in these justifications? Has the sheriff alleged enough when he has stated the writ, and that there were goods in the house liable to be seized under it; or has the other Defendant stated enough when he has added his judgment? Is it not essential that they should go further, and state, in fact, that they did seize under it? Is there any instance in which such a statement is omitted? Suppose nothing stated but the judgment and writ, and the fact that the goods were in the house; would it not have been an unanswerable objection, that you

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have stated grounds which would have justified you had you acted on these grounds: but you do not allege that you *did* act upon them. Suppose the plea had omitted the "*virtute cujus*," and had stated only that the Defendants afterwards, whilst the judgment and writ were in force, had seized the goods; would not that plea have been open to a special demurrer, on the ground that it did not state that they seized *under or by virtue* of the writ? Is it a consequence, that, because I have a judgment and writ against a man under which I might seize his goods, that when I seize his goods I really do make seizure under such judgment and writ? I may have a conditional bill of sale from him of those very goods, and may have seized under that bill of sale; I may be consignee of the goods from him, and may have taken under bills of lading which he has sent me.

The fact, then, that the Defendant might have seized, and would have been warranted in seizing under a judgment and execution, does not exempt him from the obligation upon a justification to state that he *did* so; and if so, the fact of having so seized is an essential part of the cause stated in his plea, and is liable to be put in issue either by a general or by a special traverse. Had the writ been a *capias ad respondendum*, or other mesne process, and the sheriff had justified under it, when it was *returned* he must not only have stated that he seized under and by virtue of it, but he must have stated that he returned it: *Freeman v. Blewett*, 1 Lord Raym. 632. And why? Because process will not justify him, he shall not be protected by it, unless he shews that he paid a due and full obedience in acting under it: S. C. Salk,

409. So, in *Myddleton v. Price*, 1 Wils., it is decided that where an officer justifies under process, he ought to return it, and he must shew that he has done all which it was his duty to do; and if he must shew it, is it not a traversable allegation?

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It is said, however, that to include a “*virtute cujus*” in a traverse, is unwarrantable, and that the better opinion is it cannot be done. Where a “*virtute cujus*” is a mere inference of law drawn from premises previously stated, I agree it cannot be traversed; but where it is not a legal result, but a pure question of fact, I believe all the authorities shew that it may be traversed. If, for instance, you allege that A. was in custody of the sheriff at the suit of B., and that C., who had a judgment against him, delivered a *capias ad satisfaciendum* against him to the sheriff, whereby he became and was in custody of the said sheriff at the suit of C., a traverse that he thereby became in custody at the suit of C. would be clearly bad, because the law says, in such case, he does become in the sheriff’s custody at the suit of C., and the traverse, therefore, would be the traverse of a mere matter of law. So wherever a “*virtute cujus*” introduces a consequence of law only from matter of fact previously stated, the consequence of law cannot be traversed, but the matter of fact must be the object of the answer. But where a “*virtute cujus*” introduces matter of fact, it may be, and continually is, included in a traverse.

In *Foster v. Jackson*, Hob. 52., the point traversed was, whether the sheriff took J. S. and had him in custody by virtue of a *capias ad satisfaciendum*. In *Bennett v. Filkins*, 1 Saund. 20., where the point upon the pleadings was, whether De-

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fendant, when he gave a bail-bond, was in custody under a warrant upon a writ returnable on a Friday, which was before the bail-bond was given, or upon a writ returnable on a Saturday, the day when the bail-bond was given; the point traversed was, whether he was in custody by virtue of the warrant on the Saturday writ; and in *Beale v. Simpson*, *Lord Raym.* 408. the question being under which of two writs of *habeas corpus* one B. had been taken out of Defendant's custody; the traverse was, that B. was taken out of Defendant's custody by virtue of the former of the two writs; and this traverse was held to be well taken by *Powell*, *Neville*, and *Blencowe*, against *Treby*. So much stress, however, has been laid upon the opinion of Lord C. J. Treby, that I think it right to shew that it does not militate against the opinion which I am submitting to this house. Whoever will carefully attend to the two opinions he delivered, will find that he does not put the case wholly upon the ground that every traverse, including a "*virtute cujus*," was bad; for he admits that the traverse in that case would have been good after verdict. His objection rested, in part at least, upon the intricacy of that traverse, and the multiplicity of matter, *i. e.* of fact and of law, which it contained; and he laid considerable stress upon the manner in which that came before the court, *viz.* upon special demurrer. The undue reliance, too, which he places upon *Green v. Jones*, 1 Saun. 298., seems to me to diminish the weight of his authority; for he considers that as a judgment in point, whereas in that case there was no traverse, but only a *dictum* from Saunders, who was of counsel for the Plaintiff. That *dictum* was,

that “ the Defendant had only shewn that a bill
 “ of Middlesex had been sued out *per quod* the
 “ sheriff made his warrant; so he has not alleged
 “ any thing traversable except the *per quod*, which
 “ is not traversable.” The cases, therefore, of
Beale v. Simpson, and *Green v. Jones*, appear to me
 to furnish no reasonable ground for saying that
 the including the “*virtute cujus*” in the traverse
 mentioned in your Lordships’ question, in no respect
 affects the validity of that traverse, or prevents it
 from including the question, whether the sheriff
 seized by virtue of the writ.

Two cases, however, were mentioned at your
 Lordships’ bar, which, I think, we are called
 upon to notice, *viz. Groenvelt v. Burwell*, Lord
 Raym. 452., and *Crowther v. Ramsbottom*, 7 T. R.
 654. In *Groenvelt v. Burwell*, the Defendant
 justified an arrest under a sentence and warrant.
 The warrant directed the officer to take the Plain-
 tiff, and deliver him to the keeper of the gaol
 of Newgate; and the plea alleged that the offi-
 cer did take him by virtue of the warrant, and
 delivered him, with the warrant, to the keeper of
 Newgate, there to be detained, &c.; the replica-
 tion was, that Defendants took him of their own
 wrong, and not *by virtue of the warrant*; the repli-
 cation, therefore, admitted that the warrant had
 issued, that it was in the hands of the officer, and
 that what it required, *viz.* that the Plaintiff should
 be delivered to the keeper of Newgate, had been
 effected under it. The Defendants demurred, and
 the traverse was held bad: first, because, had the
 Plaintiff been arrested by the officer upon any
 other warrant, he ought to have shewn it specially;
 and secondly, because, though he had been arrested

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under any other warrant, he would, in *law*, have been arrested under every other warrant the party making the arrest had at the time, and consequently was, in point of law, arrested under the warrant stated in the plea. That traverse, therefore, would have referred to the jury what upon the pleadings was a mere question of law, and was, therefore, upon the distinction which I have made, clearly bad.

In *Crowther v. Ramsbottom*, 7 T. R. 654., the Defendant seizing cattle, justified under a warrant upon a *justicies*, to compel an appearance in replevin, and alleged that the Plaintiff having appeared, the cattle were returned. The Plaintiff admitted the *justicies*, but traversed the residue of the cause. It appeared in evidence, that when the Defendant seized he had his warrant with him, and shewed it, and that he returned the cattle when an appearance was entered; but there being proof that he said, at the time he seized, he was seizing for a debt, it was left to the jury whether the Defendant entered for the mere purpose of compelling an appearance, or whether for the purpose of compelling Plaintiff to pay the debt; and the jury found for the Plaintiff. Now it was clear, there, that the Defendant entered under the warrant: he had it with him, and produced it, and the object of the warrant, *viz.* to compel an appearance, was answered. If he had any ulterior purpose, *viz.* that of compelling the payment of a debt, the pleadings were not calculated to raise that question, the only issue was, whether the residue of the cause stated in his plea, *i. e.* his having a warrant and acting under it, were proved. The verdict, therefore, was clearly wrong, and the

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Court could not do otherwise than grant a new trial; but, on account of some expressions which fell from the Court, stress is particularly laid on that case. Lord K. says, “I never understood a man was obliged to justify a distress for the cause which he happened to assign at the time when it was made. If he has legal justification for what he did, it is sufficient. A man may distrain for rent, and avow for heriot service. Now, here, it appears that the Defendants were justified under the process of the county court in entering upon the Plaintiff and taking his goods, in order to compel an appearance; and, therefore, the question whether they entered for that or for some other cause, ought not to have been left to the jury. The verdict, therefore, proceeded on a mistake of the law. Lawrence J., the only other judge who spoke, referred to *Groenvelt v. Burwell* as in point, and observed that the judge, in the case in question, had left to the jury what in *Groenvelt v. Burwell* was stated to be immaterial: for it was not material to enquire what they said when they entered and seized, but only whether they had, in fact, a legal warrant to justify them.”

Now all expressions are to be considered in conjunction with the facts of the case in which they are used; and in *Crowther v. Ramsbottom*, there was no doubt, not only that the Defendants had the warrant under the *justicies* at the time when they seized, but that they seized *under it*, and enforced the obedience which that writ required; at least, there was nothing to shew that they had repudiated the right to refer to that warrant as the ground on which they acted. The expressions, then, of Lord

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Kenyon and Mr. Justice Lawrence, taken in conjunction with the facts of that case, go no farther than this, that whoever seizes another man's goods, and has a right by warrant, which it is his duty to execute, so to seize them, *and applies that seizure to the purposes which that warrant directs*, he is not precluded by any thing he says at the time of the seizure from so applying them; but that does not bear, as it seems to me, upon a case where the officer *does not apply the seizure to the purposes of his warrant*, but leaves those purposes wholly unsatisfied.

Upon this ground, therefore, that, in *Groenvelt v. Burwell*, and *Crowther v. Ramsbottom*, the warrant was ultimately pursued, and the thing it commanded was enforced, which was not the case here, it seems to me that those cases form no ground for impeaching the opinion which I submit to the house, that, upon the traverse *absque residuo causæ*, it was competent to the Plaintiff to shew that the acts of the Defendant were not really done under or in execution of the writ, but for another purpose, and under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods, and that what the writ required, *viz.* to cause the debt for which the judgment was obtained to be made, was never effected or attempted.

This being my opinion, it is unnecessary to say any thing upon the new assignment; I will only observe, that, unless the Plaintiff proves more trespasses than the plea, if unanswered, necessarily covers, he cannot both reply to the plea and new assignment: he may do either, not both.

It is not necessary to say more upon this point, but I will only say, that I am of opinion that the Plaintiff cannot both reply to the plea and new assignment.

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Judges have either left the bench from age or infirmity, or are gone to receive the reward of their virtues and their labours. Your Lordships have now the authority of thirteen Judges,—my late noble and excellent friend, Lord Tenterden, who first decided the cause; the eight Judges in the Court of Exchequer Chamber, who confirmed that judgment; and of four out of the five Judges who have attended your Lordships, three of whom were not at that time Judges in the Courts of Westminster Hall. Of these five, one, for whom I entertain the greatest possible respect, differs from his learned brothers; and my respect for that learned Judge is such, that, if the question in this cause had been upon the merits, or the justice, his opinion would have been sufficient to have induced me not to have advised your Lordships to do what, under the circumstances of the case, I shall feel it my duty to advise you to do.

I will state to your Lordships the facts of this case,—as they appear in the bill of exceptions : — The Plaintiff in the Court below, the Defendant in error, was the owner of the ship Emerald. That ship proceeded on a voyage to New South Wales, and was there chartered to a person of the name of Thornton. Thornton loaded the ship and despatched her to England ; but he previously required the captain of the ship to execute a bill of lading, by which the property in this cargo was consigned to Hopley and Lingham ; but by this judgment and execution, or by the operation of it, Hopley and Lingham thought that they could get at this cargo without paying the freight ; an attempt which perhaps your Lordships will think a little dishonest and not the less so because that which I call by no softer name than fraud was to be accomplished.

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by an abuse of the process of the law which is intended only to obtain justice. Knowing that, if they took the cargo as the consignees, they must pay the freight, they had recourse to the expedient, being creditors of Thornton, of suing out a writ of execution. This writ was issued out; and it appears upon this bill of exceptions that the owner of the ship remonstrated at their not paying the freight; but Messrs. Hopley and Lingham told them in distinct terms, that they would obtain possession of the goods by any means without paying the freight, which your Lordships must be aware was very considerable, owing to the length of the voyage. They took the goods under this execution; and what did they do with them? My learned friend, who is against this judgment, has told your Lordships, that it is immaterial to show how they dealt with the goods. Upon that point I entirely differ from that learned Judge. The duty of the sheriff's was immediately to sell those goods for the best price to be obtained; to get the money into their hands, (not suffering the Plaintiff to interfere either in the manner of the sale, or in the raising the money in any way whatever;) and when they had raised the money, to pay it over to the Plaintiffs: instead of which, Hopley and Lingham, the Plaintiffs in this cause, and who pretend only to be creditors, act from the instant of the execution as the proprietors of the goods: they apply at the custom-house to have them landed; they state that they are British goods, and swear that Thornton is the importer. Now, is this dealing with these goods as the law would have dealt with them, if these persons had not improperly interfered in this matter? Unquestionably not. They had nothing to do with them;

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they should have left them to the entire management of the sheriffs; and yet those persons, immediately that they have got hold of the goods by the execution, proceed to use them as their own, and, forgetting that there is an execution, they deal with them as if no such execution had been issued; and it is quite clear that the only object in issuing the execution was to cheat the Defendant in error out of his freight: they could have no other object.

Now, these being the facts of the case, is it possible that any man can doubt what is the justice of the case? that the Plaintiff is entitled to his verdict, if there is no rule of law that prevents him. If that had been the case, I should have been glad to have had the assistance of the learned Judge who could not tell you what was in the bill of exceptions, to know his opinion of the justice of the case: if his eyes could have been legally opened to the bill of exceptions, I do not believe that that learned and excellent person would hesitate for one instant upon the question.

This, then, brings me to the consideration of the legal difficulty that arises upon this record: — The action is an action of trespass, in which the Plaintiff, the owner of the ship, states, “You (the Defendants) entered on board my ship, and have taken these goods, and you have deprived me of my property in them. I had a lien upon them, these goods being a security for the freight.” To which the Defendants say, “We took these goods under an execution against a person of the name of Thornton, to whom these goods belonged.” It is perfectly true that they did originally belong to Thornton, but Thornton had assigned the possessory right to those goods to the persons who took them in execution; and they could have taken

them at the instant he conceded to them that possessory right upon paying the freight. But they treat them as the goods of Thornton, and they say, "We took those goods under an execution against Thornton;" and they go on to allege (as I think they were bound to allege, after having taken the goods in execution), "that afterwards, "and before the return of the writ, to wit, on "the 2d of July, in the fourth year aforesaid, in "the county aforesaid, the sheriffs sold the said "goods and chattels; and by the sale thereof "made and levied the sum of 1950*l.* 10*s.* towards "satisfaction of the debt and damages." Now, the Plaintiff says, in the first place, by replication, "It is very true you did take the goods under an "execution; but," he goes on to add, "after you "had taken them in your own wrong, you did not "proceed to deal with those goods as you ought "to have dealt with them under the execution." Now, what the sheriff did with the goods, is the next material fact. So far from the sheriff selling them, as they allege in this plea that he did, the Plaintiffs in error sold them; and we have upon the face of this record an instruction to the auctioneer from the Plaintiffs in error, that they were to be bid for by a certain person, if the goods did not obtain a certain sum. Is this plea true? Unquestionably it is not. Therefore, whether this cause is to be decided upon the plea, or upon the new assignment, is perfectly immaterial: if the action can be supported upon either count, the judgment must stand. Although the learned Judges have not thought it necessary to go into the question upon the new assignment, being of opinion, that it was sufficient to falsify the plea,

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yet I cannot help thinking that the new assignment is material; and my learned brother, whose opinion is in opposition to this judgment, is a little mistaken in that respect: he has mistaken the fact: that learned Judge has said, that as to the new assignment, it does not allege that it was done for other and different purposes: if it had, it would have been demurrable. As to its being demurrable, we have nothing to do with that. If it was demurrable, and not demurred to, the Defendants have, fortunately for justice, lost the opportunity to take advantage of that slip. But the new assignment does state, that it was done for other purposes than in those pleas mentioned. Therefore, I cannot help thinking that the new assignment also is abundantly sufficient, because it states a fact that cannot be questioned,—that it was not done for the purpose of levying this debt by the execution, but that it was done by the parties acting as consignees of these goods; and that these goods were to be sold, not in execution of the writ under which they were taken, but for the purpose of the consignee, (who says, that he is the proprietor of the goods,) making the best price for them he could. It appears to me, that the new assignment is most distinctly proved by the evidence given in this cause; and, independently of the plea, the judgment of the Court below might have been sustained upon the new assignment. But I repeat, that it is not necessary that you should take up the case upon that difficult technical point, because, if the judgment is sustainable upon either ground, that is sufficient. The learned Judge to whom I have alluded has said, that it is unnecessary to introduce into this case any thing that had been done with the goods afterwards. Speaking with defer-

ence to that learned Judge, whose opinion upon this subject I respect, I should beg to express a doubt upon that point. The sheriff has not done his duty when he seizes the goods; his duty requires him to go further; his duty requires him to sell those goods, and deliver the money to the Plaintiff. It seems to me that it is necessary for him to show, not that he has partially done his duty, but that he has done his whole duty; and that cannot be done without shewing, as it is set out on the face of this plea, that, having seized the goods, he proceeded to sell the goods, and, having sold them and raised the money, he handed it over to the Plaintiff. It appears to me there is nothing unimportant in that. But, perhaps, it is enough for me to say, whether unimportant or not, here it is, and it does not lie in the mouth of the Plaintiffs in error to say it was not competent to the party to go into this question. The learned Judge has added, in support of this argument, "Suppose he could not sell; what is he to do?" He would be justified, there being no buyers: he is not bound "to sell;" but the learned Judge knows, if that was the case, he must have specially returned that fact; he must have said, I have taken the goods, and they remain in my hands for want of buyers. There cannot be a stronger circumstance to show, that all that is stated upon the record is most material to show that the sheriff has not done his duty. I take that to be a principle of law, not confined to cases of this sort, but extending over a large surface. Suppose a person commits a felony, and another person indicts him; though his motives are most malicious, still if the man has committed the felony, he is justified in doing that

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which is done, though no one would approve of the motive. But the motive is not to be enquired into, unless there is no foundation for the proceeding. But what is the distinction in the cases mentioned? It is this, — that in all those cases the writ had completely justified the party in all that he had done. If it could be shown that the sheriff was justified in all he had done by this writ, then these cases would bear upon it; and though I should have lamented it, the majority of the Judges would have been against the Plaintiff, and upon their authority I should have advised your Lordships to set aside this judgment. But, if I have taken a correct view of this case, the sheriff was not justified in all he had done. There was a great deal of that which he has done — the most important part of his acts — altogether unwarranted by any authority given to him by the writ. That writ told him to enter and take possession of the goods: that he did; but immediately after he entered, he put those goods directly under the control of other persons, whom he ought not to have permitted to have had the control over them. This case is not like the cases adverted to, because in those cases the party had an authority to cover him in whatever he did, though he exercised the authority with improper motives; but in this case, although the motives were unquestionably as bad as they could be, the sheriff was not justified by any thing contained in the writ in doing what he has done.

The next question is, whether you will add any thing to the affirmance of that judgment? If it be possible that your Lordships could approve of the conduct of Hopley and Lingham, in dealing with this property as theirs, after they had caused this

writ and execution to be issued; if you can approve of the conduct of a merchant of London attempting to get hold of this property by cheating (for no softer name can be applied to it) the party entitled to the freight of his ship, by which those goods were brought to England, and by which a value was given to them (for the goods were of trifling value in New South Wales compared with their value in England); if it is possible that any Noble Lord can approve of the conduct of a British merchant, attempting to get the benefit of the labour of others and at their expense, without making a proper return for it, then this judgment will be simply affirmed. But I am persuaded that this country is indebted for the state of its commerce to the confidence that is reposed in the integrity of British merchants, and that the commerce will no longer continue in that flourishing state, if that confidence should ever be withdrawn. I therefore submit to your Lordships, that it is fit that in all cases in which conduct comes under your Lordships' consideration tending to destroy that confidence, your Lordships should mark it with your disapprobation; and I say again, if the learned Judge to whom I have alluded, and of whom I can never speak but with respect and affection, could have entertained any doubt upon the justice of the case, I would not have recommended your Lordships to have given costs; but, being persuaded that that is not so, and putting my own authority out of the question, but standing upon the authority of a great majority of the learned Judges, and under all the circumstances of the case, I recommend to your Lordships to affirm the judgment, and to affirm it with 200*l.* costs.

Judgment affirmed, with 200*l.* costs.

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v.

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ENGLAND.

(COURT OF CHANCERY.)

THOMAS CADELL - - - *Appellant* ;

A. PALMER, C. C. EDRIDGE, H. BENGOUGH, H. RICKETTS, the younger, R. RICKETTS, the younger, W. I. OKELY, and A. E., his Wife, and A. RICKETTS, the younger, W. P. LUNELL, J. E. LUNELL, G. LUNELL, S. BENGOUGH, and G. BENGOUGH	}	<i>Respondents.</i>
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A will devising land, &c. to trustees upon trusts, for accumulation during twenty-one years, without reference to the minority of any described person, or any of the purposes of marriage ; and also creating a term in the trustees for 120 years, if twenty-eight persons named, or any or either of them should so long live ; many of the persons named being unconnected with, and taking no benefit under, the trusts ; with a term in gross of twenty years, upon trust, after the expiration of the terms of 120 years and twenty years, determinable as before provided, that the trust estates should be conveyed by the trustees to such person as would be entitled to the same, by purchase or descent, for the first or immediate estate for life, in tail or in fee in the same trust estates, as if they had by the will been devised, &c. to the use of G. B. (a nephew of the testator) for life, remainder to his sons successively in tail male, with similar remainders to other nephews and nieces upon the like limitations ; with a declaration that the person to whom the conveyances should be made should have such estate as he, &c. would be entitled to take under the limitations, if they had been made by the will ; with the like remainders over, &c. ; and that no

person should be entitled to a vested estate or any other than a contingent interest until the expiration, or other sooner determination of the 120 years, determinable, &c., and twenty years.

Held, that the will was valid, by way of executory devise, both as to the trust for accumulation under the 39 & 40 Geo. 3., and also as to the limitations to take effect at the expiration of the lives named, and twenty-one years absolute as a term in possession, without reference to infancy or minority.

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HENRY BENGOUGH, by his will, dated the 14th of April, 1818, and duly executed, charged all his real and personal estates with an annuity of £1000. to his wife; and after the decease of his wife (to whom he gave a life interest in a house and premises in Saint James's Square), devised the said messuage or tenement, gardens, or out-let land, coach-houses, stables, buildings, and premises, unto the Rev. Charles Lucas Edridge, doctor of divinity (since deceased), and to the Respondent, Arthur Palmer the younger, and the Rev. Charles Cadell Edridge, and to George Wright, banker, their heirs and assigns; to hold the same hereditaments unto and to the use of the said Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright, their heirs and assigns, for ever; upon trust, that his trustees, or the survivors or survivor of them, or the heirs of such survivor, should at any time within seven years after the decease of his wife, or as they or he should think fit and proper and most advantageous, sell and dispose of the same messuage or tenement, gardens, ground, or out-let land, coach-houses, stables, buildings, offices, and hereditaments, either

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by public auction or private contract : And he directed, that the monies to arise from the sale or sales of the hereditaments so devised should sink into and become and compose part of his general personal estate, by him therein-after bequeathed, and be paid, applied, and disposed of upon the trusts and for the intents and purposes therein-after declared and expressed, or referred to, concerning the same : And he also declared and directed, that after the decease of his said wife, and in the mean time until the hereditaments should be so sold and disposed of, the rents and profits thereof should be paid and applied to and for the benefit of such person and persons as should, under and by virtue of the will and the trusts therein-after declared, be entitled to the dividends, interest, and income of the monies arising or to be produced from such sale of the same hereditaments, in case such sale and disposition had been then actually made, and in the same shares and proportions : And the testator gave and devised unto the said Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright, his mansion-house called Pen Park, &c., and all the messuages, farms, lands, and hereditaments which he had contracted for and agreed to purchase, and which might not have been conveyed to him at the time of his decease and the benefit of such contract and contracts respectively, and all other the messuages, farms, lands, hereditaments, and real estates whatsoever and wheresoever situate, lying, or being, belonging to him, either at law or in equity, or over which he had any power of appointment or other disposition, or in which he had any devisable estate or interest, &c. to hold, &c. unto and to the use of

them the said Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright, their heirs and assigns for ever, upon trust, as to Pen Park House, to permit his wife to occupy the same during her life; and after her decease, out of the rents of his trust estates, to pay an annuity of 300*l.* to his nephew, George Bengough, for life, and 200*l.* a year to his nephew, Henry Bengough. And, "subject to the payment of the said several annuities, and other wise subject as therein-before mentioned, upon trust, that the trustees for the time being of the said testator's said will, should, from time to time during the term of twenty-one years, to be computed from the day of his decease, collect and receive the rents, issues, and profits of all and singular his said real estates, so devised to them in trust as aforesaid, and (subject to the payment of the said annuities of 4000*l.*, 300*l.*, and 200*l.*, or such of the said annuities as should from time to time be subsisting during the said term of twenty-one years) should from time to time, during the continuance of the said term of twenty-one years, lay out and invest the monies to arise from such rents, issues, and profits in the purchase of freehold estates of inheritance in fee-simple in England, when and as often as there should be a surplus in hand arising from the receipt and collection of such rents, issues, and profits amounting to the sum of 1500*l.*, after paying and keeping down the annuity of 400*l.* to his wife, either out of the rents of his real estates, or out of the dividends, interest, and income of his personal estate, or out of both of those funds; and also after paying and keeping

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“ down the annuities of 300*l.* and 200*l.* out of
 “ rents of his real estates : ” — And the testator
 rected that such freehold estates of inheritance
 to be purchased by his trustees as aforesaid, shou
 from time to time, be conveyed and assured u
 and to the use of the trustees for the time being
 his will, upon such and the same trusts, and to
 for such and the same ends, intents, and purpo
 and subject to such and the same powers, provis
 and conditions as were therein-after limited,
 pressed, declared, and contained of and concern
 all and singular the several messuages, lands, te
 ments, estates, and hereditaments, by him there
 before given and devised, unto and to the use
 them, the said Charles Lucas Edridge, Arthur I
 mer, Charles Cadell Edridge, and George Wrig
 their heirs and assigns : And he directed that
 trustees for the time being of his said will, shou
 never permit a larger sum than 500*l.* arising fr
 the receipt of the rents and profits of his said r
 estates, to remain at any one time in the hands
 any bankers ; but that when, and as often as th
 should be the sum of 500*l.* in hand, the sa
 should be laid out and invested in the purchase
 3 per cent. consolidated Bank Annuities, in t
 names of the trustees for the time being of
 will, until a convenient purchase or convenie
 purchases could be found, or until a sufficient s
 of money should be accumulated to make a prop
 purchase or proper purchases : And he direct
 that the interest, dividends, and income of su
 3 per cent. consolidated Bank Annuities, shou
 during the said term of twenty-one years, and
 longer, accumulate in the same manner, and :

the same purposes, as the rents and profits of the said estates, so to be purchased, were by him directed to accumulate: And as to, for, and concerning all the said trust estates and hereditaments,

by him thereby devised to the said Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright (except his messuage and hereditaments in St. James's Square), upon trust, that they and the trustees, for the time being of his will, should retain and stand and be possessed of his said trust estates, during the term of 120 years, to commence and be computed from his death, and fully to be complete and ended, if his nephews, George Bengough and Henry Bengough, his nephew James Bengough, his great nephews Henry Ricketts the younger, and Richard Ricketts the younger, his niece Ann Elizabeth Bengough, his great niece Ann Ricketts the younger, the ten children then living of the said Charles Lucas Edridge, whose names were (here blank was left in the will), and the eleven children then living of the said Arthur Palmer, whose names were Julia Palmer, George Washington Palmer, Isabella Palmer, Henry Andrews Palmer, Elizabeth Palmer, Frederick Palmer, Helen Palmer, Arthur Hare Palmer, Charles James Palmer, Jordan Palmer, and Mary Ann Palmer, or any or other of his said nephews and niece, and great nephews and great niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live; and also during the term of twenty years, to be computed from the end, expiration, or other sooner termination of the said term of 120 years, determinable as aforesaid; nevertheless in trust for

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the person and persons therein-after mentioned, and for the respective times therein-after expressed, (that is to say), upon trust for his said nephew George Bengough, for a term of ninety-nine years, if he should so long live, and the said terms of 120 years, determinable as aforesaid, and twenty years, or either of them should so long continue. And from and after the expiration, or other sooner determination of the said term of ninety-nine years, determinable as aforesaid, then in trust for the first, second, third, fourth, fifth, sixth, and all and every other and subsequent born son of the same George Bengough, severally and successively, according to the priority of their births; and after the determination of the estate and interest of each of the same sons respectively, and also as the circumstances of the case should require after the determination of the estate, of any person taking from time to time under or as answering the description of heir male of his body, in trust, for the person who, for the time being, and from time to time, should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son, and the heirs male of his body, to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person respectively, should so long live; and the said terms of 120 years, determinable as aforesaid, and twenty years, or either of them, should so long continue, every elder of the same sons, and the person who for the time being, and from time to time, should answer, or who in case of the death of his parent, if such death had taken place, would answer the descrip-

tion of heir male of his body, to be preferred before every younger of the same sons, and the person who, for the time being, should answer, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body."

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The testator then proceeded to declare several successive trusts of the estates, during the said terms of 120 years, determinable as aforesaid, and twenty years, in favour of his nephews Henry Bengough and James Bengough, his great nephews Henry Ricketts the younger and Richard Ricketts the younger, his niece Ann Elizabeth Bengough, and his great niece Ann Ricketts the younger, respectively, and their respective first and other subsequent born sons, and of the persons who for the time being should be, or who, in case of the death of their respective parents, would be, heirs male of such sons respectively, similar to the trusts herein-before stated to have been declared in favour of the said George Bengough, and his first and other subsequent born sons, and of the person who, for the time being, should be, or who in case of the death of his parent would be, heir male of the body of each of the same sons respectively, &c. And from and after the determination of the said trusts, then in trust for the person or persons respectively, who, for the time being, and from time to time, should answer the description of his the said testator's heir or right heirs at law; and if there should be more than one in the same parts, shares, and proportions, as they would be entitled to a real estate descending from him the said testator, as the first purchaser thereof, and vesting in him or them as his right heirs; to

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hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of 120 years determinable as aforesaid, and twenty years, or either of them, should so long continue.

The testator then directed that each of the said terms of ninety-nine years, determinable as aforesaid, should commence and be computed from the time when the person or persons respectively to whom the same terms were limited, should become entitled to the income of all or any part of the said trust estates, under the limitations or trusts therein-before contained : And further, that in case the limitations or trusts therein-before contained, to or in favour of persons unborn, could not take effect precisely in the order in which they were directed to take place, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be then born, then and in that case he directed that the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being, and from time to time, have been entitled to the next estate in remainder ; subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation or trust, to receive the income of his said trust estates from his, her, or their actual birth or respective births.

And he directed, that from and after the expiration, or, which should first happen, other sooner determination of the said terms of 120 years, determinable as aforesaid, and twenty years, his said trust estates should be settled, conveyed, and assured by his then trustee or trustees thereof, to and upon such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail or in fee, in the same trust estates, if the same trust estates had by his will been devised, settled, or assured in manner and to the effect following (that is to say): to the use of his nephew the said George Bengough and his assigns for life, with remainder to his first and other sons successively, according to the priority of their births, in tail male; with remainder to the said testator's nephew, Henry Bengough, and his assigns, for his life, with remainder to his first and other sons successively, according to the priority of their births, in tail male; with similar remainders in succession to his nephew James Bengough, and his great nephew, Henry Ricketts the younger, his great nephew, Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, his said great niece, Ann Ricketts the younger, and their sons respectively, &c.

And he further directed, that the person or persons to whom such conveyances should be made, should have such estate in the said trust estates as he, she, or they would at that time be entitled to take under the said limitations, if the same limitations had been actually made by his will, with the same or the like remainders over as if the said trust estates had been devised by his will in manner

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aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit; yet, nevertheless, he directed and declared, that no such person should have or be entitled to a vested estate, or any other than a contingent interest, until the expiration, or, which should first happen, the sooner determination of the terms of 120 years, determinable as aforesaid, and twenty years.

And he declared, that such limitations were introduced into his said will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gift to, or raising any immediate or present estate by way of trust or otherwise for them; on the contrary thereof he directed, that during the said terms of 120 years, determinable as aforesaid, and twenty years, no person or persons should be entitled at law or in equity to any beneficial estate of and in his said trust estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years, determinable as therein-before was mentioned. And that in the events and in the mode therein-before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right; and after giving a power to the trustees to change the chattel interest for ninety-nine years, of any nephew, &c. to an estate of freehold, for life, &c. he gave and bequeathed unto the said Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright, their executors and administrators, all the rest, residue, and remainder of his stocks, funds, monies, mortgages, and securities for money, and all other his

goods, chattels, and personal estate and effects whatsoever and wheresoever, and of every nature, kind, sort, and denomination soever, which he should be possessed of, interested in, or entitled unto, or which should be due, owing, or belonging to him, at the time of his decease, not by him therein-before disposed of (subject to the payment of his just debts, and funeral and testamentary charges and expenses, and the several legacies and bequests by him in and by his said will given and bequeathed as aforesaid), upon trust, nevertheless, that the said Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright, and the survivors and survivor of them, and the executors and administrators of such survivor, and the trustees for the time being of his will, should either continue his monies in and upon the stocks, funds, mortgages, or other securities, in or upon which the same should be invested or placed at his decease, or call in and collect and receive the same, and sell and convert into money all such part and parts of his said residuary estate and effects as should not consist of money, or securities for money. And he ordered and directed, that during the term or period of twenty-one years, to be computed from the day of his decease, the trustees for the time being of his will should receive the dividends, interest, and annual income of all his said residuary estate and effects, and from time to time, during such term of twenty-one years, place, lay out, and invest all such dividends, interest, and income, and the accumulations of and upon the same dividends, interest, and income, in the names of the trustees for the time being of his will, either in the purchase of three per cent. consolidated

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bank annuities, or upon mortgage or mortgages of freehold manors, messuages, lands, tenements, or hereditaments, to be situate within Great Britain, of a clear and indefeasible estate of inheritance in fee simple, as they should think proper, as an accumulating fund, in addition to and in order to increase the principal of his said residuary estate and effects, during such term or period of twenty-one years; and should, with all convenient speed, from time to time, during the said term or period of twenty-one years, lay out and invest all his residuary estate and effects, and all accumulations and increase thereof, in purchases of freehold manors, messuages, lands, or hereditaments, of an estate of inheritance in fee simple, in some convenient place in England or Wales, when and as often as eligible purchases should arise; which estates so to be purchased, should be conveyed and assured unto and to the use of the said Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright, their heirs and assigns, or the trustees for the time being of his will, to, for, and upon such and the same, and the like trusts, estates, uses, intents, and purposes, and under and subject to such and the same, or the like powers, provisos, charges, conditions, restrictions, and limitations as were by him therein-before created, limited, or declared of and concerning his said estates, messuages, lands, and hereditaments, by him therein-before devised to them the said Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright, in trust, as therein-before mentioned and expressed, or as near thereto as the deaths of parties, the change of interests, and other circumstances and contingencies, would admit: And the said testator di-

rected the trustees for the time being of his said will, to lay out and invest the said residuary personal estate, and the accumulations and income arising therefrom, during the said term or period of twenty-one years, in such purchases aforesaid, as often as they shall have 2000*l.* in hand, and suitable and proper purchases should offer, which in their judgment and discretion they should think ought to be made.

He appointed Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright, to be executors in trust of his will.

The testator died on the 10th of April, 1818, without having revoked or altered his will; leaving George Bengough, his heir at law, and Henry Bengough, James Bengough, Henry Ricketts the younger, Richard Ricketts the younger, Ann Elizabeth Bengough, and Ann Ricketts the younger, and his widow, Joanna Bengough, and Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, and George Wright surviving. Ann Ricketts, widow, the testator's sister, was his only next of kin at the time of his death; and the said Ann Ricketts, and the testator's widow, and George Bengough, and his brothers and sister, were the only persons entitled to distributive shares of the testator's personal estate, in case he had died intestate.

Shortly after the death of the testator, Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, proved the testator's will in the proper ecclesiastical court; but George Wright renounced probate of the will; and by a deed dated the 3d day of December, 1818, and made between

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George Wright, of the one part, and Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, of the other part, George Wright disclaimed to Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, their heirs, executors, administrators, and assigns, all the real and personal estate, mortgages, securities, trusts, powers, and authorities whatsoever, by the will given, devised and bequeathed.

Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, jointly possessed themselves of part of the personal estates and effects of the testator; but Arthur Palmer alone principally acted in the affairs of the testator, and received other parts of the personal estate, to a large amount; and out of the monies which came to his hands, Arthur Palmer paid the testator's debts, funeral and testamentary expenses, and certain of the legacies and annuities given by his will; and after paying the several legacies which remained unpaid, and setting apart sufficient of the personal estate to answer the annuities payable thereout, a large surplus remained unapplied.

Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, after the death of the testator, also entered upon, and took possession of, the several real estates devised to them by the will, and received the rents and profits thereof.

Joanna Bengough, the widow of the testator, died on the 10th of June, 1821, having first duly made and published her last will and testament in writing, dated the 14th day of December, 1818, and appointed the Appellant, Thomas Cadell and Charles Lucas Edridge, executors, who duly proved the will.

Joanna Bengough in her life-time received from Arthur Palmer her legacy of 1000*l.*, and her annuity of 4000*l.*; and after her death, a proportionate part of the annuity, up to the day of her death, was paid to her executors.

Richard Ricketts died in the life-time of Ann Ricketts, his wife, and she died in the month of October, 1819, having made her will, and appointed the Respondents, W. P. Lunell, J. E. Lunell, and George Lunell, executors; and they duly proved the same in the proper Ecclesiastical Court.

The testator's nephew, George Bengough, in or 'as of Trinity Term, in the year 1821, filed his original bill of complaint in the High Court of Chancery, and it was afterwards amended by an order dated 9th of April, 1823; and such amended bill was against Charles Lucas Edridge, Arthur Palmer, Charles Cadell Edridge, Henry Bengough, James Bengough (since deceased), Henry Ricketts the younger, Richard Ricketts the younger, Ann Elizabeth Bengough, and Ann Ricketts the younger, the Appellant Thomas Cadell, and the said William Peter Lunell, John Evans Lunell, and George Lunell, as Defendants thereto, and stated to the effect herein-before stated; and also stated that, in compliance with the requisition contained in the testator's will for that purpose, George Bengough executed certain deeds for conveying the property mentioned in the said will to the mayor, burgesses, and commonalty of the city of Bristol, according to the directions contained in the said testator's will, and prayed (amongst other things) that the said testator's will might be declared to be well proved, and that the trusts thereof, so far as the same

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respectively were good in law, might be decreed to be carried into execution, and that an account might be decreed to be taken of the personal estate and effects of the said testator possessed and received by the said Defendants, Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, or by any of them, or by any persons or person by their or any of their order, or for their or any of their use; and that an account might also be taken of the funeral and testamentary expenses, and of the debts of the said testator, and of the legacies and annuities given by his said will; and that the personal estate and effects of the said testator might be applied in a due course of administration; and that sufficient sums of money might be set apart to answer and satisfy the annuities given by the said testator's will, except the annuities of 300*l.* and 200*l.*, which were charged upon the real estate of the said testator only; and that the clear residue or surplus of the said testator's personal estate might be ascertained and applied under the directions of the Court, upon the trusts of the said testator's will, so far as the same were effectual in law; and so far as the same were ineffectual in law, then to such persons or person as would in such case by law be entitled thereto; and that the sums so set apart to answer the said annuities when and as such annuities should respectively cease to be any longer payable, might be invested and applied upon the trusts of the said testator's will, or otherwise, as therein aforesaid; and that an account might be decreed to be taken of the real estates belonging to the said testator, at the time of making his will, and of his death, and of the sums of money received by the said De-

endants, Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, or by any of them, or by any person or persons by their or any of their order, or for their or any of their use, for or in respect of the rents and profits of the said real estates, and that what should be found due from them, on taking such account, might be applied upon the trusts of the said testator's will, so far as the same were good in law; and that the Court would be pleased to declare how far the said trusts of the real and personal estate were good; and as far as the said trusts might be declared to be void, that the said Plaintiff might be declared to be entitled to the real estate; but in case the said trusts of the said will should be considered valid, then that such of the rents and profits of the estates devised to the said trustees in possession, as accrued during the life of the said Joanna Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, and the said annuities of 300*l.* to the said Plaintiff, and 200*l.* to the said Defendant, Henry Bengough, respectively, might be paid and satisfied out of the said rents and profits, and that the residue thereof might, during the remainder of the said term of twenty-one years, be also applied in the purchase of freehold estates of inheritance in England or Wales; and that such estates, when purchased, might be conveyed to the trustees for the time being of the said testator's will, upon the trusts declared in the said will of the said estates so to be purchased. And that when and as often as there should be the sum of 1500*l.*, arising from the rents and profits of the said devised estates, such sum of 1500*l.* might be laid out in such purchases of freehold estates as


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aforesaid, and that the Plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said estates so to be purchased, for the term of ninety-nine years, if the Plaintiff should so long live; such term to commence and be computed from the death of the said testator; and that in case the said rents and profits should not, as soon as they amounted to 1500*l.*, be so laid out, the Plaintiff might be declared entitled to the interest and dividends thereof, from the time the same rents and profits amounted to 1500*l.*, until the same should be so laid out in the purchase of freehold estates as aforesaid: And that if it should appear that the said Defendants, Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, had already received more than the sum of 1500*l.* from the rents and profits of the said devised trust estates, and had laid out the same in the purchase of freehold estates, the Plaintiff might be declared entitled to the possession and enjoyment thereof from the time the same estates were so purchased, for a term of ninety-nine years, if the said Plaintiff should so long live; such term to be computed from the death of the said testator; or if such sum of 1500*l.* had been so received by the said Defendants, Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, and not yet applied in such purchase, that the said Plaintiff might be declared entitled to the interest and dividends which had accrued on such sum, from the time the last-named Defendants had received the same; and also to the interest and dividends which should accrue due thereon, until the same should be laid out in the purchase of freehold estates of inheritance, as aforesaid: Or that, in case the same

trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for declaring and effectuating the rights of the persons entitled so far as the trusts were invalid ; and that, if necessary, a proper person might be appointed to collect and get in the outstanding personal estate of the said testator, and to collect and receive the rents and profits of the said real estates of the said testator, and to manage the same, and that all necessary directions might be given for that purpose.

The several Defendants appeared to the bill, and put in their respective answers thereto.

The cause came on to be heard on the 31st day of May, 1823, before his Honour the then Vice-Chancellor, and it was ordered, that it should be referred to Mr. Alexander, then one of the Masters of the Court of Chancery, to enquire, and state to the Court, who was the heir at law of the testator at the time of his death, and who was then his heir at law, and who were his next of kin at the time of his death, and, if any of them were since dead, who were their legal personal representatives ; and for the better discovery thereof, the usual directions were given, and the Court reserved the consideration of all further directions, and of the costs of the suit, until after the Master should have made his report ; and any of the parties were to be at liberty to apply to the Court as there should be occasion.

The Master by his report dated 17th December, 1823, made in pursuance of the order, certified that the plaintiff, George Bengough, the nephew of the testator, was, at the time of his death, and then was,

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the heir at law of the testator; and that Ann Ricketts, deceased, the sister of the testator, was his only next of kin at the time of his death; and that the Respondents William Peter Lunell, John Evans Lunell, and George Lunell, her executors, having duly proved her will in the Prerogative Court of the Archbishop of Canterbury, were then her legal personal representatives; and the only persons who, together with the plaintiff, George Bengough, and the defendants, Henry Bengough, James Bengough, and Ann Elizabeth Bengough, the children of the testator's late brother, George Bengough, and the Defendant, Charles Lucas Edridge, and the Appellant, the executors of Joanna Bengough, the widow of the testator, would, in case of intestacy, have been entitled to distributive shares of the personal estate of the testator.

James Bengough died on the 4th day of December, 1825, intestate, leaving Sarah Bengough, his widow; and Sarah Bengough obtained letters of administration of James Bengough's personal estate and effects, to be granted to her by and out of the proper ecclesiastical court.

George Bengough on the 21st of December, 1825, filed his bill of revivor in the Court of Chancery against Sarah Bengough; and by an order of the Court, bearing date the 7th day of January, 1826, the suit was accordingly revived.

Charles Lucas Edridge died on the 4th of January, 1826, leaving Arthur Palmer and Charles Cadell Edridge, him surviving; and the testator's niece, Ann Elizabeth Bengough, intermarried with William Ignatius Okely.

The cause came on to be heard, on further directions, before the Vice Chancellor, and by a de-

cree bearing date the 24th of January, 1827, it was declared, that the testator's will ought to be established, and the trusts thereof performed and carried into execution, and the Court ordered and decreed the same accordingly; and it was amongst other things ordered, that the Plaintiff's bill should be dismissed out of the Court, as against the Defendants William Peter Lunell, John Evans Lunell, George Lunell, and Sarah Bengough, and the Appellant, with costs, to be taxed and paid as thereafter directed. And the Court declared, that according to the true construction of the testator's will, the Plaintiff was not entitled to the immediate possession and enjoyment of the freehold estates, which the testator had, by his will, directed to be purchased with the rents and profits of the real estates, devised by his will, and the accumulations of those rents; but that the rents of such estates to be so purchased were, according to the true construction of the will, subject to the trusts for accumulation during the term of twenty-one years, commencing from the death of the said testator.

This decree was signed by the Lord Chancellor, on the 31st day of March, 1828, and enrolled among the records of the Court of Chancery.


The appeal was against the decree on further directions.

For the Appellants, Sir *Edward Sugden* and Mr. *Lynch*.

For the Respondent, Arthur Palmer, Mr. *Preston* and Mr. *Wilbraham*.

For the Respondent, George Bengough, Mr. *Pepys* and Mr. *Piggott*.

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For the Appellants,

The trusts declared of the testator's personal estate and effects, by his will, are not confined within those boundaries which the law allows for trusts of this description.


The whole machinery of the will is a fraud on the rule of law. The accumulation is taken for the whole term of twenty-one years allowed by the Thellusson Act, and without reference to any minority, or any legitimate object of settlement, and it is not until the expiration of that term that the limitations are made to commence. Accumulation and executory limitations were by the law, as it stood before the Thellusson Act, co-extensive; but a testator could not first accumulate for lives in being and twenty-one years, and then postpone the vesting for the like further period. *This is the first step.* Then the estates are devised to trustees for 120 years, if twenty-eight persons or any or either of them shall so long live. These persons are many of them unconnected with the trusts, and the testator was ignorant of their names. This limitation, however, is framed in order to create an estate determinable with existing lives, which therefore has no tendency to a perpetuity; but in the first place, it has never been decided, that estates in point of perpetuity can be carved out of such an estate which cannot be raised out of the inheritance, and there are powerful reasons against such a decision; and, in the next place, it has never been decided, that such an estate can be carved out of an inheritance the whole interest in which is intended to be dedicated to the same uses for the direct and declared purpose of creating a perpetuity; for the equitable estates created out of this portion of the inherit-

ance, do not unite with the estates created in the reversion of the inheritance, although the same persons are to take in every event. *This is the second step.* There is then added a term in gross of twenty years upon the same trusts; but the twenty-one years allowed by the rule after lives in being were admitted for the purposes of gestation and infancy, and were never allowed as an absolute term. Here the twenty years are taken as an independent term, merely because that term falls within the words of the rule, altogether disregarding the principles upon which it was founded. *This is the third step.* After every rule has been separately resorted to, and the time allowed by it exhausted, then comes *the fourth and last step*, a trust for the very persons who would be entitled to the freehold and inheritance under the previous trusts, if regular trusts had been declared for life and in tail, according to the usual form of settlements. Why is all this machinery used? The answer is obvious, — It is a vain attempt at a perpetuity. Look at the whole as a result from the combination of the several parts, and it will be found that the entire equitable fee-simple is dedicated to the particular uses expressed in the will, but those uses so framed as to postpone for probably a vast number of years that right of disposition resulting from ownership, which no regular limitations known to the law can effect. It seems a sufficient objection to the will in question, that it is the first attempt of the kind, and that the consequences are obviously mischievous. When Lord Nottingham was asked where he would stop, he answered, “I will stop every where when any inconvenience appears, no where before: for

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“ whensoever the bounds of reason or convenience
“ are exceeded, the law will quickly be known.”
In this case the bounds of reason are exceeded,
and the inconvenience is manifest.

The trusts declared of the personal estate and effects of the testator should, for the same reasons, be declared void ; and, therefore, such personal estate and effects, after payment of the testator’s debts, funeral and testamentary expenses and legacies, should be divided amongst the parties entitled to distributive shares of the personal estate of the testator, living at his decease, or their representatives, as if he had died intestate.

For the Respondents.

No estate or interest given by the will is open to the objection of transgressing the rules of law against perpetuities.

The period of accumulation is restricted to a term of twenty-one years from the testator’s death, and an accumulation during that period is warranted by the rules of law, and is consistent with the provisions of the statute passed in the thirty-ninth and fortieth years of the reign of George the Third, intituled “ An Act to restrain all Trusts
“ and Directions in Deeds or Wills, whereby the
“ profits or produce of real or personal estate
“ shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein
“ limited.”

Every contingent or future interest given by the will is so limited, that it must vest or fail of effect within twenty years from the death of the survivor of the lives in being at the date of the will; and the rule of law against perpetuities allows of a suspense of the time of vesting for a life or

lives in being, and a further period of twenty-one years, and in some cases for a period and even two periods of gestation.

As the rule of law is not transgressed, but its limits are observed by the testator, and he has in all dispositions kept within the limits prescribed by the rule, no argument of fraud on the rule, or of inconvenience from the application of the rule, is entitled to any weight in a court of justice. It is the province of the legislature, and not of a court of justice, to reform the law if it admits of an inconvenience.

Rules of law are framed as a guide to judges for their decision, and to professional men for their advice and conduct in practice, and individuals in their testamentary and other dispositions; and no gift, or grant, or devise, kept within the terms of the rule, can be obnoxious to the objection of being a violation of the rule; since the rule is the only criterion by which the validity of the gift, &c. can be ascertained.

The authorities cited in argument were as follows:—*Taylor v. Biddall*, 2 Mod. 289. *The Duke of Norfolk's Case*, 3 Ch. Rep. *Somerville v. Lethbridge*, 6 T. R. 213. *Lloyd v. Carew*, Show. P. C. 137. *Marks v. Marks*, 10 Mod. 420. *Stephens v. Stephens*, C. T. Talb. 228. Rep. Linc. Inn. Lib. *Long v. Blackall*, 7 T. R. 100. *Jee v. Audley*, 1 Cox, 324. *Routledge v. Dorrell*, 2 Ves. jun. 357. *Leake v. Robinson*, 2 Meriv. 391. *Crooke v. De Vandez*, 9 Ves. 197. *Woodford v. Thellusson*, 4 Ves. jun. 317. 821., and 11 Ves. 135. 143. 146., and the stat. 39 & 40 G. 3. c. 98. *Keeley v. Fowler*, in D. P. 1768., *Fearne Ex. Dev.* 482. (6th ed.) 2 vol., Cas.

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and Opin. 440. *Goodtitle v. Wood*, Willes Rep. 213. *Doe v. Fonnerean*, Doug. 508., Eden's Rep. 418. *Goodman v. Goodright*, 2 Burr. 873. *Beard v. Westcott*, 5 Tau. 392. 406., 5 B. & A. 801., and 1 Turn. & Russ. 25. *Fearne Ex. Dev.* 7th ed. 431. *Heath v. Heath*, 1 B. C. C. 147. *Massenburgh v. Ash*, 1 Vern. 234. *Loddington v. Kime*, 1 L. Raym. 207. *Scatterwood v. Edge*, 1 Salk. 229. *Mador v. Staines*, 2 P. W. 421. *Stanley v. Leigh*, 2 P. W. 686. *Sheffield v. Lord Orrery*, 3 Atk. 283. 287. *Gulliver v. Wickett*, 1 Wils. 105. *Bullock v. Stones*, 2 Ves. 521. *Duke of Marlborough v. Lord Godolphin*, 1 Eden, 404., 3 B. P. C. 245. *Griffith v. Vere*, 9 Ves. 127.; see p. 131. *Lade v. Holford*, 3 Burr. 1416., Amb. 479. *Proctor v. Bishop of Bath and Wells*, 2 H. Blac. 358. *Ware v. Polhill*, 11 Ves. 257. *King v. Cotton*, 2 P. W. 358. *Gore v. Gore*, 2 P. W. 28. 63. *Marshall v. Marshall*, 2 Swan. 432. *Lord Southampton v. Marquess of Hertford*, 2 Ves. & B. 54. *Spencer v. Duke of Marlborough*, 5 B. P. C. 592. *Manning's Case*, 8 Rep. 94. *Lampet's Case*, 10 Rep. 46. *Child v. Bailey*, Cro. Jac. 459. *Pells v. Brown*, Cro. Jac. 592. *Sanders v. Cornish*, Cro. Car. 230. *Pearse v. Reeve*, Pollexfen, 29. *Goring v. Bickerstaffe*, Pollexfen, 31. *Snow v. Cutler*, 1 Levinz. 135. *Love v. Windham*, 2 Keble, 637., 1 Mod. 50. *Wood v. Saunders*, Pollex. 35.; see 2 Swan. 467. *Phillips v. Deakin*, 1 M. & S. 744. *Mogg v. Mogg*, 1 Meriv. 654. *Swaine v. Burton*, 15 Ves. 365. *Heath v. Heath*, 1 B. C. C. 147. *Robinson v. Hardcastle*, 2 T. R. 241. 380. and 781., 2 B. C. C. 22. 344. *Humberstone v. Humberstone*, 1 P. W. 332. *Blandford v. Hackerall*, 2 V. jun. 241. *Duke of St. Albans v. Lord Deerhurst*; see 5 Madd. 232. *Countess of Lincoln v. Duke of Newcastle*,

es. 231. *Duke of Bridgewater v. Egerton*,
s. 122. *Roe v. Jeffery*, 7 T. R. 589. *Tre-
ell v. Sydenham*, 3 Dow. 194. and Bligh's MS.
; D. 1814-15. Fearne C. R. 422. 431. Cruise
445. Black. Com. 174. Sander's Uses, 194.
od's Lect. 229. *Stanley v. Leigh*, 2 P. W.
Gilb. Uses, 359. *Hinde v. Lyon*, 2 Leon. 11.

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the Judges having been summoned by the
e, attended to hear the case argued; and
ions* were put to them. The opinion of the
es was delivered by Bayley B., as follows:—
e first question proposed by your Lordships'
e for the consideration of H. M. Judges, is
“Whether a limitation by way of executory
ise is void, as too remote, or otherwise, if it
ot to take effect until after the determination
one or more life or lives in being, and upon
expiration of a term of twenty-one years
erwards as a *term in gross*, and without re-
e to the infancy of any person who is to
e under such limitations, or of any other
son.” And I am to return to your Lordships

he first, which was the only question directly applicable
case, is recited in the opinion of the Judges. The two
were upon supposed cases, as follows:—2. Whether a
ion, by way of executory devise, is void as too remote,
erwise, if it is not to take effect until after the deter-
on of a life or lives in being, and upon the expiration of
of twenty-one years afterwards, *together with the number
ths equal to the ordinary period of gestation*; but the
of such years and months to be taken as a term in gross,
ithout reference to the infancy of any person whatever
r in *ventre sa mère*. 3. Whether a limitation, &c. (as
, *together with the number of months equal to the longest
of gestation*. But the whole, &c. (as in the second
n).

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the unanimous opinion of the Judges who heard the argument at your Lordships' bar, that such a limitation is not too remote or otherwise void.

Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd v. Carew*, 1 Show. Parl. Cases, 137 (in 1696), and *Marks v. Marks*, 10 Mod. 419 (in 1719), establish the point that, for certain purposes, such time, as with reference to those purposes might be deemed *reasonable*, beyond a life or lives in being, might be allowed. The *purpose in each* of those cases was to give to a third person an option, after the death of a particular tenant, to purchase the estate, and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go to the length for which they were pressed at your Lordships' bar: they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed, and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limit, and that there are cases in which it may be exceeded. *Taylor v. Biddall*, 2 Mod., 2 and 9 (1677), is the first instance we have met with in the books in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Wharton and their heirs, as they

should attain their respective ages of twenty-one years. There might be an interval, therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his body, and the period when such heirs should attain twenty-one, till which time the estate was not to vest; and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in *Stephens v. Stephens*. That was a case of infancy also. The executory devise there was, “to such other son of
 “ the body of my daughter, Mary Stephens, by my
 “ son-in-law, Thomas Stephens, as shall happen to
 “ attain his age of twenty-one years, his heirs and
 “ assigns for ever.” And the Judges of the King’s Bench certified that the devise was good. The certificate in that case is peculiar; it refers to *Taylor v. Biddall*, and says that, however unwilling “they might be to extend the rules laid
 “ down for executory devises beyond the rule
 “ generally laid down by their predecessors, yet,
 “ upon the authority of that judgment, and its
 “ conformity to several late *determinations in cases*
 “ *of terms of years*, and considering that the power
 “ of alienation would not be restrained longer than
 “ the law would restrain it, viz., during the infancy
 “ of the first taker, which could not reasonably be
 “ said to extend to a perpetuity, and considering
 “ that such construction would make the testator’s
 “ whole disposition take effect, which otherwise
 “ would be defeated, they were of opinion that
 “ that devise was good by way of executory
 “ devise.” This was also a case of infancy: it

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was on account of that infancy that the vesting of the estate was postponed, and though under that limitation the vesting of the estate *might* be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would, and it might vest at a much earlier period. These decisions, therefore, do not distinctly or necessarily establish the position that a term in gross for twenty-one years, without any reference to infancy, or a life or lives in esse, will be good by way of executory devise, but there is nothing in them necessarily to *confine* it to cases of infancy. The contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle v. Wood*, Willes 213, 7 T.R. 103., L. C. J. Willes discusses shortly the doctrine of executory devises, and notices their “progress of late years: he says the doctrine of executory devises has been settled. They have not been considered as bare possibilities, but as certain interests, and estates, and have been resembled to contingent remainders in all other respects, only they have been under some restraints to prevent perpetuities; as first it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, viz., to a child *en ventre sa mere* at the time of the father’s death, because, as the contingency must necessarily happen within less than nine or ten months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been

“*extended to twenty-one years* after the death of a
 “*person in being*, as in that case likewise there is
 “no danger of a perpetuity.”

In citing this passage in *Thellusson v. Woodford*, 1 H. 13. C. 388., Lord Chief Justice M'Donald prefaces it by this eulogium: “The result of all the
 “cases is that summed up by Lord Chief Justice
 “Willes with his usual accuracy and perspicuity.” He does indeed afterwards say (p. 393.), after noticing *Long v. Blackall*, “The established length
 “of time during which the vesting may be sus-
 “pended, is a life or lives in being, the period of
 “*gestation* and the infancy of such posthumous
 “child.” That rather implies that he thought the rule was confined to cases of minority. This opinion, though not published till 1797, was delivered in 1740, and in the minds of those who heard it, or of any who have the opportunity of reading it, might raise a belief that there were interests in which a period of twenty-one years after the death of a person in esse *without reference to minority*, had been allowed, and though there be no such case reported, it does not follow that none such was decided. In *Goodtitle v. Goodman*, Burr. 879., there is this passage, “It is a future devise, to take
 “place after an indefinite failure of issue, of the
 “body of a former devisee, which *far exceeds* the
 “*allowed compass* of a life or lives in being; and
 “*twenty-one years after* (which is the line now
 “drawn, and very sensibly and rightly drawn).” This was published in 1766, and whether the last approving paragraph was the language of Lord Mansfield or of the reporter, it was calculated to draw out some contradiction or explanation if that were not generally understood by the profession as

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the correct limit. In *Buckworth v. Thickell*, 3 Bos. & Pull. 654. n., Lord Mansfield says, “ I remember
 “ the introduction of the rule which prescribes the
 “ time in which executory devises must take effect
 “ to be a life or lives in being, *and twenty-one*
years afterwards.” In *Wilkinson v. South*, 7 T. R. 558, Lord Kenyon says, “ The rule respecting
 “ executory devises is extremely well settled, and
 “ a limitation by way of executory devise is good
 “ if it may take place after a life or lives in being,
 “ and within twenty-one years and the fraction of
 “ another year afterwards.”

In *Long v. Blackall*, 7 T. R. 102., Lord Kenyon says, “ The rules respecting executory devises
 “ have conformed to the rules laid down in the con-
 “ struction of legal limitations, and the courts have
 “ said that estates shall not be *unalienable* by exe-
 “ cutory devise for a longer time than is allowed by
 “ the limitations of a common law conveyance. In
 “ marriage settlements, the estate may be limited
 “ to the first and other sons of the marriage, in tail;
 “ and until the person to whom the last remainder
 “ is limited is of age, the estate is unalienable; in
 “ conformity to that rule, the courts have said, so
 “ far we will hold executory devises to be good;”
 and after referring to the *Duke of Norfolk's Case*,
 he concludes, “ It is an established rule that an
 “ executory devise is good, if it must necessarily
 “ happen within a life or lives in being, and
 “ twenty-one years and the fraction of another
 “ year, allowing for the time of gestation.”

In *Jee v. Audley*, 1 Cox 325., Lord Kenyon M. R. says, “ Limitations of personal estate
 “ are void unless *they necessarily vest, if at all,*
 “ *within a life or lives in being,* and twenty-one

“ years or nine or ten months afterwards. This
 “ has been sanctioned by the opinions of *judges of*
 “ *all times, from the Duke of Norfolk's Case to the*
 “ *present time* ; it is grown reverend by age, and
 “ is not now to be broken in upon.”

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We would not wish the House to suppose that there are not expressions in other cases about the same period, from which it might be clearly collected that a minority was originally the foundation of the limit, and sufficient to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such minority. But the manner in which the rule is expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion that it was at length extended to the enlarged limit of a life or lives in being, and twenty-one years afterwards. It is difficult to suppose that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule as they did, without expressing minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding that the rule of twenty-one years was general, without the qualification of minority. Blackstone J., in his Commentaries, puts as the limit of executory devise, “ that the contingencies ought
 “ to be such as may happen within a reasonable
 “ time, as within one or more lives in being, or
 “ within a moderate term of years, for courts of
 “ justice will not indulge even wills so as to create
 “ perpetuity. The utmost length that has been
 “ hitherto allowed for the contingency of an exe-
 “ cutory devise (of either kind) to happen in, is

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“that of a life or lives in being; and *twenty-one*
 “*years afterwards*, as when lands are devised to
 “such unborn son of a feme covert as shall first
 “attain twenty-one, and his heirs, the utmost length
 “of time that can happen before the estate can
 “vest, is the life of the mother, and the subsequent
 “infancy of her son; and this hath been decreed
 “to be a good executory devise.”

Mr. Fearn in his elaborate work upon Executory
 Devises, thus lays down the rule (p. 129.) :—“An
 “executory devise to vest within a short time after
 “the period of a life in being is good, as in *Lloyd*
 “*v. Carew* (which he states), and *Marks v. Marks*
 “The Courts, indeed, have gone so far as to admit
 “of executory devises limited to vest *within twenty-*
 “*one years* after the period of a life in being, as in
 “*Stephens v. Stephens*, *Taylor v. Biddall*, and *Sabbarton v. Sabbarton*,” (all of which he states, and
 in all of which vesting was postponed on account
 of minority only, and then he draws this conclu-
 sion :) “so that the law seems to be now settled
 “that an executory devise, either of real or per-
 “sonal estate, which must, in the nature of the
 “limitation, vest *within twenty-one years* after the
 “period of a life in being is good, and this appears
 “to be the longest period yet allowed for (the) vest-
 “ing of such estates.” The instances put are all
 instances of minority only, in which the twenty-one
 years were allowed; but, by stating it generally, as
 he did, he must have considered twenty-one years
 generally, independently of minority, as the rule.
 The same observation applies to Blackstone. That
 such was the understanding of Fearn may be col-
 lected from many other passages in his work, but from
 none more distinctly than in the third division of his

first chapter on Executory Devises, 7th Ed. p. 399
 401, where, after having mentioned as the second
 sort of executory devises, those where the devisor
 gives a future estate to arise upon a contingency;
 without at present disposing of the fee, and after
 putting several instances, he concludes the division
 thus: — “And the case of a limitation to one for
 “life, and from and after the expiration of one
 “day, or any other supposed period not exceeding
 “twenty-one years (we may suppose), next ensuing
 “his decease, then over to another, may be ad-
 “duced as an instance of the case, for the latter
 “part of the extent to which I have opened the
 “second branch of the general distribution of
 “executory devises.” In his third chapter, p. 470.;
 he begins his eighth division with this position: —
 “It is the same (i. e. an executory devise is not
 “too remote), if the dying without issue be con-
 “fined to the compass of twenty-one years after
 “the period of a life in being,” and in the eighth
 division of chapter 4., p. 117., he says, “It seems
 “now to be settled that whatever number of limi-
 “tations there may be after the first executory
 “devise of the whole interest, any one of them
 “that is so limited, that it must take effect, if
 “at all, *within twenty-one years*, the period of a
 “life then in being may be good in event, if no
 “one of the preceding limitations, which would
 “carry the whole interest, happen to vest.” The
 great and experienced editor, Mr. Butler, though
 he mentions what Lord Alvanley had said to the
 contrary in 4 Ves. 337.; yet he gives extracts from
 what Mr. Hargrave (who agrees with Fearn) had
 said upon the subject, as if the inclination of his

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opinion was that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length in *Beard v. Westcott*, 5 Taunt. 393., the question whether an executory devise was good, though it was not to take effect till the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put to the Judges by Sir Wm. Grant, then M. R., and they certified that the point, though necessarily *involved* in that will, was not prominently brought forward either upon the will itself, or upon the first of the two cases that was stated; and least it might have escaped the notice and consideration of the Court of C. B., it was made the subject of an additional statement to that Court. The first certificate was in November 1812, the next in November 1813, and the Judges who signed them were Sir James Mansfield, Heath, Lawrence, Chambre, and Gibbs, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord Eldon to the Court of King's Bench, and that Court certified, that the same limitations which the C. B. had held valid, were void, as being too remote; but the foundation of this certificate was, that a previous limitation clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which that Court had held good, and the question whether the limitations of twenty-one years absolutely was valid after a life in being, did not receive that full con-

sideration which it would otherwise have done, if the determination upon that point had not been superseded by the determination upon the other.

Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in *Beard v. Westcott*, and the *dicta* by Willes C. J., Lord Mansfield, and Lord Kenyon, and the rules laid down in Blackstone and Fearne, we consider ourselves warranted in saying, that the time limited is a life or lives in being, and *twenty-one years afterwards*, without reference to the infancy of any person whatever. This will certainly render the estate inalienable for twenty-one years after lives in being, but it will preserve in safety any limitation which may have been made upon the authority of the *dicta* or text writers I have named, and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with a number of months equal to the ordinary (or longest) period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born, or in *ventre sa mère*, the unanimous opinion of the Judges is, that such a limitation would be void, as too remote. They consider twenty-one years as the limitation, and the period of gestation to be allowed in these cases only in which the gestation exists.

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The Lord Chancellor.—I propose to move the House to concur in giving judgment according to the unanimous opinion of the Judges now delivered. The two last questions were put with a view to the arguments at the bar, and the origin of the rule against perpetuity, as applicable to executory devises. The rule originally introduced was limited to a life, then to lives in being, and afterwards was extended, for convenience, to the end of the infancy of the children of the person to whom the life estates were limited. The rule might have been considered as established by decision of this House, in the case of *Lloyd v. Carew*.* As to the doubt which has been expressed, whether the rule has been adopted in the practice or opinion of conveyancers, the passages cited from Fearne on Executory Devises, in the opinion just delivered, shew that it was the settled opinion of that great conveyancer and lawyer, that the term of twenty-one years after lives in being, might be added as a term in gross. Mr. Butler, the able editor of Mr. Fearne's book, in his commentary upon this question, confirms the opinion of his author. The opinion of Lord Mansfield was the same; nor is the doctrine impeached by the *dicta* of Lord Kenyon in *Long v. Blackall*.† The doctrine may now be considered as finally settled, and the judgment, in accordance with the opinion delivered, ought to be affirmed.

Judgment affirmed.

* 1 Show. P. C. 137.

† 7 T. R. 100.

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ENGLAND.

(EXCHEQUER CHAMBER.)

THOMAS HENRY MIREHOUSE, Clerk, and WILLIAM SQUIRE MIREHOUSE, Clerk, who have survived GEORGE, Bishop of LINCOLN, - - } *Plaintiffs in Error ;*

FRANCES HENRIETTA BENNELL, Widow, - - - } *Defendant in Error.*

An advowson belonging to a prebendary, in right of his prebend, became vacant, and the prebendary died without having presented: Held, that the right of presentation belonged to the personal representatives of the prebendary.

THIS writ of error was brought by the Defendants below, upon a judgment of the Court of King's Bench, reserving a judgment of the Court of Common Pleas on a writ of *quare impedit*, in a cause wherein the Defendant in error was Plaintiff, and the Plaintiffs in error were Defendants.

The Court of Common Pleas gave judgment in Michaelmas term 1825, for the Plaintiffs in error, whereupon a writ of error into the King's Bench was brought by the Defendant in error.

The Court of King's Bench, in Trinity term

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1827, reversed the judgment given in the Court of Common Bench, whereupon the writ of error was brought.

The declaration in the Court of Common Bench, was as follows —

Lincolnshire, to wit. George, Bishop of Lincoln, Thomas Henry Mirehouse, clerk, and William Squire Mirehouse, clerk, were summoned to answer Frances Henrietta Rennell, widow, relict and administratrix of all and singular the goods, chattels, and credits, which were of Thomas Rennell, clerk, bachelor in divinity, deceased at the time of his death, who died intestate of a plea, that they permit the said Frances Henrietta, to present a fit person to the rectory of the parish church of Welby, in the county of Lincoln, which is vacant, and in her gift as administratrix as aforesaid; and whereupon the said Frances Henrietta, by Gregory James Best, her attorney, complains, for that whereas one William Dodwell, clerk, doctor in divinity, late prebendary of the prebend or canonry of South Grantham, founded in the cathedral church of Salisbury, heretofore, to wit, on the 27th day of October, in the year of our Lord 1775; to wit at Boston, in the county of Lincoln, was seised of and in the said prebend or canonry with its appurtenances, to which said prebend or canonry the advowson of the said rectory of the said parish church of Welby, with its appurtenances, then belonged and still belongs in his demesne as of fee in right of the said prebend or canonry, and the said William Dodwell, doctor in divinity so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry with its appurtenances to which, &c., afterwards, to wit, on the

same day and year aforesaid, at Boston aforesaid, in the county aforesaid, presented to the said church of Welby being then vacant, one William Dodwell, master of arts, his clerk, who on the said presentation of the said William Dodwell, doctor in divinity was admitted, instituted, and inducted into the same, in the time of peace in the time of our Sovereign Lord George the Third, late King of Great Britain; and the said Frances Henrietta, further says that, the said William Dodwell, doctor in divinity, being so seised of the said prebend or canonry with its appurtenances to which, &c. in his demesne as of fee in right of the said prebend or canonry, he the said William Dodwell, doctor in divinity, afterwards, to wit, on the 1st day of October, in the year of our Lord 1785; to wit, at Boston aforesaid, in the county aforesaid, died, so seised after whose death to wit on the 29th day of October, in the year last aforesaid to wit at Boston aforesaid in the county aforesaid, one Robert Price, clerk, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry with its appurtenances to which, &c. whereby the said Robert Price, then and there became and was seised of and in the said prebend or canonry with its appurtenances to which, &c. in his demesne as of fee in right of the said prebend or canonry; and the said Frances Henrietta further says, that the said Robert Price, being so seised of and in the said prebend or canonry, with its appurtenances to which, &c. in his demesne as of fee in right of the said prebend or canonry, he the said Robert Price, afterwards to wit on the first day of April, in the year of our Lord 1823, at Boston aforesaid in the county aforesaid, died, so seised

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after whose death, to wit, on the 23d day of April, in the year last aforesaid at Boston aforesaid in the county aforesaid, the said Thomas Rennell, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances to which, &c., whereby the said Thomas Rennell then and there became and was seised of and in the said prebend or canonry, with its appurtenances to which, &c., in his demesne as of fee in right of the said prebend or canonry, and the said Thomas Rennell being so seised the said church, afterwards, to wit, on the 1st day of June, in the year of our Lord 1824, at Boston aforesaid, in the county aforesaid, became vacant by the death of the said Rev. William Dodwell, clerk, the late parson and incumbent thereof, and still is vacant, whereby it then and there belonged to the said Thomas Rennell to present a fit person to the said rectory of the said parish church so being vacant as aforesaid, and the said Frances Henrietta further saith, that afterwards, and whilst the said church was so vacant as aforesaid, to wit, on the 30th day of June, in the year last aforesaid, at Boston aforesaid, in the county aforesaid, the said Thomas Rennell died intestate, so seised of and in the said prebend or canonry, with its appurtenances to which, &c., in his demesne as of fee in right of the said prebend or canonry, without having presented any person to the said rectory of the said parish church, after whose death, and whilst the said church was so vacant as aforesaid, to wit, on the 22d day of July, in the year last aforesaid, at Boston aforesaid, in the county aforesaid, administration of all and singular the goods, chattels, and credits which were of the said Thomas

Rennell, deceased at the time of his death, who died intestate, by the Right Reverend Father in God, Charles, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan, was in due form of law granted to the said Frances Henrietta, whereupon and whereby it then and there belonged, and now belongs, to the said Frances Henrietta, as administratrix as aforesaid, to present a fit person to the said rectory of the said parish church so being vacant as aforesaid, and which is still vacant, but the said Bishop of Lincoln, and the said Thomas Henry Mirehouse, and William Squire Mirehouse, unjustly hinder her from presenting a fit person to the said rectory of the said parish church, whereupon the said Frances Henrietta, administratrix as aforesaid, saith that she is injured, and hath sustained damage to the value of 1000*l.*, and therefore she brings her suit, &c. And the said Frances Henrietta brings into Court here the letters of administration of the said archbishop, which give sufficient evidence to the said Court here of the grant of administration to the said Frances Henrietta as aforesaid, the date whereof is a certain day and year, to wit, the day and year above in that behalf mentioned, &c.

The Defendants pleaded as follows:

And the said Defendant George Bishop of Lincoln, by William Gillmore Bolton his attorney, comes and defends the wrong and injury, when &c. and saith that the said rectory of the said parish Church of Welby is within his diocese of Lincoln, and that he hath nothing, nor doth he claim to have any thing in the said rectory of the church aforesaid, or in the advowson of the same, except

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only the admission, institution, and induction of the rectors to the same rectory and parish church, and all such other things as belong to the ordinary as ordinary of that place, and this he is ready to verify, wherefore he prays judgment if the said Frances Henrietta without assigning some special disturbance in the person of him the said bishop, ought to have or maintain her said action against him, &c.; and the said Defendants Thomas Henry Mirehouse, clerk, and William Squire Mirehouse, clerk, by William Gillmore Bolton their attorney, come and defend the wrong and injury, when, &c., and say that the said Frances Henrietta ought not to have or maintain her said action against them, because they say that after the said Thomas Rennell had so died, without having presented any person to the said rectory of the said parish church, and whilst the said church was so vacant as aforesaid, to wit on the 19th day of July in the year last aforesaid, at Boston aforesaid, in the county aforesaid, he the said Defendant, Thomas Henry Mirehouse, clerk, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry with its appurtenances, to which said prebend or canonry, the said advowson with its appurtenances then belonged and still belongs, whereby he the said Thomas Henry Mirehouse then and there became, and was seised of and in the said prebend or canonry with its appurtenances, to which, &c., in his demesne, as of fee in right of the said prebend or canonry, and whereby it then and there belonged to him, to present a fit person to the said rectory so being vacant as aforesaid; and the said Thomas Henry Mirehouse and the said William Squire Mirehouse further say, that, he the said Thomas

Henry Mirehouse so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry with its appurtenances, to which, &c.; afterwards to wit on the 26th day of September in the year last aforesaid, at Boston aforesaid in the county aforesaid, presented to the said Church of Welby being then vacant, the said Defendant William Squire Mirehouse his clerk, for the purpose of his being admitted, instituted, and inducted into the same; but which said admission, institution, and induction have been hindered and prevented by His Majesty's writ of Ne Admittas to the said Defendant Lord Bishop of Lincoln in that behalf directed, for which reason the said Thomas Henry Mirehouse hath prevented the said Frances Henrietta from presenting a fit person to the said church, and this they the said Thomas Henry Mirehouse and William Squire Mirehouse are ready to verify, wherefore they pray judgment if the said Frances Henrietta ought to have or maintain her aforesaid action thereof against them, &c., and they also thereupon pray a writ to the said Bishop, &c.

The replication and demurrer were as follows:

And the said Frances Henrietta, as to the plea of the said bishop, (inasmuch as he hath not, nor claimeth to have any thing in the church aforesaid, or in the advowson of the same, except only the admission, institution, and induction of the rectors to the same rectory and parish church, and all such other things as belong to the ordinary as ordinary of that place,) prays judgment against the said bishop, and a writ to the said bishop, &c. Therefore it is considered, that the said Frances Henrietta recover against the said bishop her pre-

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presentation to the said church, and that she have a writ to the said bishop, that, notwithstanding his disclaimer, he admit a fit person to the said church on the presentation of the said Frances Henrietta, and the said bishop is not amerced because he hath excused himself of any particular disturbance, but let execution thereof be stayed until the said plea between the said Frances Henrietta and the said Thomas Henry Mirehouse and William Squire Mirehouse, be determined, &c. and the said Frances Henrietta as to the plea of the said Thomas Henry Mirehouse, and William Squire Mirehouse, by them above pleaded, says, that the said plea, and the matters and things therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude her the said Francis Henrietta from having and maintaining her aforesaid action against them the said Thomas Henry Mirehouse and William Squire Mirehouse, and that she the said Frances Henrietta is not bound by the law of the land to answer the same, wherefore for want of a sufficient plea in this behalf the said Frances Henrietta prays judgment and her damages by reason of the hinderance aforesaid, together with a writ to the said bishop to be adjudged to her, &c.

The Defendants joined in demurrer.

The Court of Common Pleas as of Michaelmas Term 1825, gave judgment* that the Plaintiff take nothing by her writ against the bishop, and Thomas Henry Mirehouse, and William Squire Mirehouse, and that she be in mercy for her false claim against them; and that the bishop, and Thomas Henry

* See 3 Bing. 228.

Mirehouse, and William Squire Mirehouse, go thereof, without day, &c.

Upon this judgment Frances Henrietta brought a writ of error into the King's Bench, and assigned the common errors, and the bishop, T. H. Mirehouse, and W. S. Mirehouse, joined in error. The Court of King's Bench, as of Trinity Term 1827, gave judgment*, that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid be reversed, annulled, and altogether held for nothing, and that Frances Henrietta be restored to all things which she hath lost by occasion of the judgment, &c.

Upon this judgment the plaintiffs in error brought a writ of error in parliament, &c.

The reasons assigned in the printed cases were as follows:—

For the Plaintiff in error.

It is against the principles of law, and inconsistent with the general character, and rights and duties of an administrator, that a right of presentation to a church left vacant by the intestate should pass to such administrator, even where the intestate was seised of the advowson in his natural capacity. Even if it should be thought that an administrator has a right to present where the intestate was seised of the advowson in his natural capacity, still it has never yet been decided, and is against law, that the administratrix should have that right where the intestate was seised not in his natural, but in a politic or corporate capacity. The right of presentation to the church, at the time of the death of Thomas Rennell, was parcel

* See 7 Barn. & Cres. 113.

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of the succession in the advowson, and, together with the residue of such succession, passed to the person who succeeded to the corporate rights of Thomas Rennell in the prebend to which the same was appurtenant.

Although it be considered, that in technical language the presentation may be deemed to be severed from the rectory, still, by the principles and policy of law, the Plaintiff in error, as succeeding prebendary, is entitled to the presentation as part of the appurtenances of his prebend, to which the administratrix of his predecessor can prefer no legal claim. It is contrary to public policy, and repugnant to the manifest intention of the founder of the endowment, that the right of presentation should be held to pass to a person not being a prebendary of the prebend so endowed, nor claiming, under any act or deed of any of the former prebendaries.

For the Defendant in error.

The right of the owner of an advowson cannot depend upon the manner in which he became owner, whether by grant, descent, devise, or office. The accidental character of the person exercising the right, cannot alter the nature of the right itself. It is not disputed, that if a presentative church, the advowson of which belongs to a layman, become vacant, and the lay patron die without presenting, his executor shall present, and not his heir, devisee, or the next owner of the advowson; for so soon as a church becomes vacant, the right of presentation for that turn is separated and disannexed from the advowson, and vests personally in the then owner of the advowson; the next turn, when separated from the advowson, is a

chattel or fruit fallen, and no part of the advowson, in the same manner as rent due at the death of a lessor, is separated from the reversion and inheritance, and belongs to the executor, and not the heir or devisee.

The circumstance of this advowson belonging to a prebendary in right of his prebend makes no difference, even supposing that there be any distinction in this respect between lay and ecclesiastical patrons, since laymen might have holden prebends before the statute 18 and 14 Charles 2. c. 4. s. 13. And there is nothing to shew that this advowson was given to the prebendary as an ecclesiastic. Even supposing that the prebendary must have been an ecclesiastic, this right of presentation is not an ecclesiastical trust, to be exercised only by an ecclesiastical prebendary. For there are numerous instances of prebendaries, bishops, &c., making grants of the next turn of a living to laymen. And such lay grantees and their executors, have repeatedly in their own names brought writs of *quare impedit* for disturbance of their rights to present, which shews that ecclesiastical patrons may pass their right of presentation into the hands of laymen, as an archbishop may bequeath his options to a layman.

It is evident that the advowsons of all rectories (and the principal case respects the advowson of a rectory) must have been originally in lay hands, and those which are now found in the hands of spiritual corporations, aggregate or sole, must have come to them by grant from the original lay patrons, and therefore with all the incidents of lay fees. The law is the same for ecclesiastical as for lay

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patrons; the descent of advowsons, in both cases, is regulated by the temporal and not the ecclesiastical law. Even the ecclesiastical law would not give the vacant turn to the successor.

This case cannot be likened to that of a bishop dying during the vacancy of a church of which he is patron; in which case, neither the bishop's executors nor his successor shall have the turn; but the King, by his prerogative as guardian of the temporalities of the bishop, in the same manner as the King by his prerogative presents to the vacant church where tenant *in capite* of a manor to which an advowson is appendant, holden by knight's service, dies, his heir being within age.

A prebendary is a corporation sole, and a chattel cannot go in the succession of a sole corporation, unless it be in the case of the king, or by special custom; and this advowson belongs to the prebendary as such sole corporation, and not as a member of the aggregate corporation of the Dean and Chapter of Salisbury.

There is nothing upon this record from which it appears who was the donor of this advowson to the prebendary, or under what circumstances it was given, or that it is subject to any other incidents or liabilities than such as follow the course of the common law, nor is there any thing on this record from which it can be inferred, that the intention of the donor, whoever he was, in granting the advowson to a corporation sole, was that the successor should take the vacant turn, and even if such intention did appear, or could be allowed to be proved upon this record, it would be illegal and void; for no one can create a new law

of succession contrary to the rules of the common law, or annex terms to a grant of which by law it is unsusceptible.

Although the advowson belongs to the prebendary in right of his prebend, the vacant turn does not.

The case was argued* before the House of Lords in 1830, by *The Solicitor-General* and *Serjt. D'Oyly* for the Plaintiffs in error, and by *Mr. Follett* and *Mr. (now Mr. Justice) Patteson* for the Defendant in error.

The following question was put to the Judges:—

An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented. Does the right of presentation belong to the personal representatives?

The Judges gave their respective opinions upon this question in the session of 1833.

Bosanquet J. — My Lords, the question proposed by your Lordships to the Judges for their opinion, is this:—

An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented; does the right of presentation belong to the personal representatives?

In offering my humble reasons to your Lordships for answering this question in the affirmative, I propose with permission to consider it;

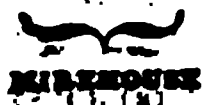
First, with reference to the right of presentation itself, to which the question relates;

Secondly, with reference to the person (a prebendary of a cathedral church) to whom the right first accrued;

* The principal arguments are noticed in the opinions of the Judges, and are omitted in the report to avoid repetition.



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Thirdly, with reference to the deceased prebendary's personal representatives, whose right is the immediate subject of the question.

With respect to the first point, I take it to be clear that the patron's right of presentation to an ecclesiastical benefice is a temporal right.

It is expressly said by St. Germain, in the 36th cap. of the doctor and student, that the right of presentation is a temporal thing and a temporal inheritance.

It was insisted, however, at your Lordships' bar, that the right of presenting is a personal spiritual trust; and the authority of Bishop Gibson was relied on in support of that position.

Bishop Gibson (Codex, tit. 33. chap. 1.) does indeed question the propriety of calling it a temporal inheritance, or that it ought, legally speaking, to be considered otherwise than as a spiritual trust. But he refers to no authority in support of his view of the subject; and in the very same chapter in which he suggests this doubt, he says that the right of nominating, which at first was annexed to the person building or endowing the church, became, by degrees, appendant to the manor in which it was built; that the right of advowson, though appended to a manor, castle, &c., may be severed from it, and that, being severed, it becomes an advowson in gross; and he calls the right itself an incorporeal inheritance, which may be granted by deed or will.

The grounds upon which it has been considered that the advowson or patron's right to present is a temporal and not a spiritual inheritance, are well stated by Godolphin (Repertorium Canonicum, p. 209.), who was, as your Lordships know, an eminent civilian and king's advocate after the restoration of King Charles the Second. It hath ever been held, he says, that by the common law an advowson is a temporal inheritance, for which he gives the following reasons: — that it lieth in tenure, and may be holden either of the king or of a common person, and hath been held of the king *in capite* or in knight's service; that a writ of right of advowson lieth for him who hath an estate in an advowson in fee simple; that a *præcipe quod*

reddat lieth for it; that a common recovery may be suffered of it; that an advowson as other temporal inheritances may be forfeited by attainder, or lost by usurpation, negligence, and other means there specified; that the wife shall be endowed thereof, and the husband be tenant by the curtesy; that it may be taken in coparcenary; that it may pass by way of exchange for other temporal inheritance; that by grant of all lands and tenements an advowson doth pass, and if not by livery, yet by deed is transferable as other temporal inheritances, which pass with the manors whereunto they are appendant.

It is said that the object of an advowson is of a spiritual nature, since it is to provide a spiritual person to serve the church; but the right to nominate such person is not the less a *temporal estate*. That right, according to Fleming C.J. (*Starkie and Pool's Case*, 1 Bulstrode, 28.), is an interest and not authority. The spiritual interests of the church are provided for by subjecting the fitness of the person nominated to the judgment of the bishop, but the exercise of the patron's *right of nomination* is not subject to the jurisdiction of any court but the king's temporal courts.

On this point Godolphin (p. 256.) says, "It is sufficient for the ordinary's discharge, if the presentee be able, by whomsoever he be presented; which authority is acknowledged on all sides to have ever been inherent in the ecclesiastical jurisdiction. But as to the right of presentation itself, to determine who ought to present, and who not, and at what time, and when the church shall be judged to become void, and when not, all these appertain to the king's temporal laws."

It appears to me, therefore, to be indisputable, that a right of presentation is temporal property, the alienation of which must be governed by the rules and analogies of the common law; and that it is no more to be considered in contemplation of law as a trust, than any other temporal property, for the proper use of which the owner is responsible only *in foro conscientie*.

An advowson being an incorporeal hereditament, may be taken by descent, conveyance, or devise, like other tem-

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poral property of that class. It may be limited in fee or in tail for term of life or for years.

If the advowson be held in fee or in tail, it descends to the heir general or special. If for life, it passes to the remainder-man or reversioner; all these being freehold interests. A term of years, or a single turn, goes to the executor or administrator, such interests being less than freehold; and the whole estate, or a portion of it, or a single turn only, may be sold for a pecuniary consideration.

If, indeed, the church be vacant, the right of presentation for that turn cannot be granted by a subject either for value or gratuitously.

This restriction, however, is not peculiar to a right of presentation; it applies to annuity or rent actually due, which may be granted before the day of payment, but which cease to be alienable at law after they have accrued; yet the arrears in both cases are unquestionably temporal rights.

The nature of the difference which subsists between the right to present on the next turn which may accrue, and the right of presentation to a vacant turn, it is now material to consider.


The right to present upon the next turn which shall accrue is an interest carved out of the fee in the advowson, and if reconveyed to the owner of the fee, will merge.

But the right of presentation to a vacant benefice, though arising from the advowson, is no part of it.

It has sometimes been called a chattel, sometimes a *chose in action*, sometimes a fruit fallen. It is called (in Dyer, 283.) a mere personal thing, a thing in right, power and authority, a thing in action and in effect, the fruit and execution of the advowson, and not the advowson. In Co. Lit. 120. a. it is said to be not *merely* a *chose in action*, for it survives to the husband, which a bond does not. But, by whatever name it may be called, it is treated in law as a right of a distinct nature from the ownership of the advowson itself.

In Jenkins's Cent. p. 236., it was held by all the Judges

of England that, where the next presentation to a church, then void, had been granted, the grant being made by a subject was void: "for the present avoidance (it is said) is a thing in action and privity, and vested in the person of the grantor (the patron), and is like a relief or arrear of rent, or an obligation, or a debt;" and it is added, "if a grantee of an annuity in fee grants an annuity for life or years, it is good; for this is an estate settled and of continuance; but a grant of the arrears of the annuity is void *causa qua supra*;" that is, because the subject of the grant is become a *chose in action*; and notwithstanding what is stated in the note to *The Bishop of Lincoln v. Wolferstan*, in 3 Burr. 1512, respecting the fictitious nature of this reason, it appears to me fully warranted both by analogy and authority in point.

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No instance can be shewn in our books in which a right of presentation to a vacant church has accompanied the ownership of an advowson in the hands of a subject, if the person to whom the right of presenting accrued has ceased, either by death or otherwise, to hold the advowson.

If a right of presentation accrues to the owner in fee of the advowson, it does not pass to his heir.

If the right accrues to a tenant in tail or tenant for life of the advowson, it does not pass to the issue in tail or the remainder-man.

But in all these cases it goes to the executor, as the representative of the personal rights of the individual to whom it accrued.

If the right accrues to a lessee for years of the advowson, and the term expire within six months afterwards, the lessee is entitled to present, notwithstanding the expiration of the term, in preference to the reversioner. Upon what principle can such a claim be sustained, but that of a personal right vested in the individual during the term, distinct from his interest in the advowson?

If a feme covert be entitled to an advowson, and the church become void during the coverture, and the husband survive, he shall present: but if the avoidance happened before the coverture he shall not present; such right

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being, as it is said, only a chattel real in action not reduced into possession during the coverture. And if the avoidance happen during the coverture, the husband shall present, though he be not tenant by the curtesy, as in cases where the wife had but a life estate, or where there has been no issue of the marriage; and in such case, if the husband himself die before the presentment, his executor shall present, and not the heir. (Watson's Clerg. Law, chap. 9.) Can any reason be assigned for this but that the right which had accrued during the coverture was distinct from the estate in the advowson?

The uniformity of the law in all these instances appears to me manifestly to shew the general rule to be, that a right to present to a vacant church vests in the individual to whom it accrues as a personal right, which, though accruing from the advowson, is no part of it, is not annexed to it, and does not follow it when it devolves upon any other person than the individual to whom the right of presentation first accrued.

Two instances indeed may be mentioned, in which, though the right of presentation does not pass to the succeeding owner of the advowson, it does not pass to the personal representatives of the deceased individual to whom it first accrued.

These are the cases of a bishop and a tenant *in capite* of the crown, in both of which cases the right belongs to the king.

This right of the king upon the death of a bishop is sometimes said to arise by reason of his title to the temporalities, and sometimes by reason of his prerogative.

But it is equally consistent with either form of expression to say, that it arises by reason of the relation in which a bishop stands to the king.

The temporalities of a bishop, of which his advowsons form a part, are held of the king *per baroniam*.

The title of the king to seize the temporalities upon the bishop's decease may reasonably be referred to the tenure by which they are held; and the further title to one of the fruits of these temporalities accrued during the life of

the bishop, and vested in him as a chattel at his death, may, consistently with the analogies of the law, be referred to the same source.

That the right in question is a condition of the bishop's tenure *per baroniam*, there is great reason to suppose, from the similarity of right which accrues to the king in the case of a tenant *in capite* by knight's service.

If a tenant *in capite* be seised of a manor with an advowson appendant, and the church become void, and he die, his heir within age, the king shall not only have the wardship, with the right of presenting to such livings as became void during the infancy of the heir, but to any right of presentation which accrued during the life of his tenant.

In this respect the case of tenant *in capite* is strictly analogous to that of a bishop. Yet if the land be holden by knight's service of a common person, and not of the king, the executors of the deceased tenant shall present, and not the guardian. (Co. Litt. 90 a. 388 a.)

And if tenant in socage be seised of an advowson, and the church become void, and he die, his heir under age, the guardian in socage, shall not present, but the executor or administrator.

Sir E. Coke in one place gives as a reason why the king shall present in the case of a bishop, that the presentation is but a *chose in action* (90 a.), and in another that nothing shall be taken for the presentation, and therefore it is no assets (388 a.).

The circumstance of the presentment being a *chose in action* is a singular ground of objection to its going to the executor; and that of its not being assets would be equally applicable to the cases of a tenant who holds in socage, and to a tenant paravail who holds by knight's service, in both which cases the executor is entitled.

How far indeed it is quite correct to say that a presentation is not assets, will be seen hereafter.

If the right of the king to a presentation accrued before the bishop's death be not a condition of tenure, it may possibly be derived from the same principle which entitles

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the king to other personal property of the bishop upon his death.

It will be recollected that the king is entitled (according to Sir E. Coke, 2 Inst. 491.) to six things — the bishop's best horse or palfry, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and ewer; his gold ring; and, lastly, his *muta canum*, his mew or kennel of hounds; which, says the record quoted by Sir E. Coke, *ad dominum regem ratione prerogativæ suæ spectant et pertinent*.

The origin of the king's right to these chattels is not very clearly ascertained. Coke says that it was not any mortuary; but it was given to the king as a fine that the bishops might have power to make wills and grant probates and administrations. Blackstone, on the other hand (vol. ii. p. 245.), thinks that it was in the nature of a mortuary, which he calls a sort of ecclesiastical heriot, a term which imports a duty due to a superior, either by service or custom. Whether it is to be referred to the cause assigned by the one or the other of these learned persons, it is clear that in cases to which the king's right did not extend, the chattels would pass to the executor.

To shew that the right of presentation is not distinct from the advowson, the following case is relied on in Fitz. N. B. 33. : — “ If the king have an advowson in fee which voids, and during the voidance the king *granteth* the advowson in fee, the king shall not present to this avoidance.” Now it will be observed that this proposition turns altogether upon the effect of the king's *grant*; and that a *chose in action* is grantable by the king, which it is not by a subject.

That the proposition is founded on the operation of the king's *grant* may, in some degree, be inferred from what follows; viz. “ But if the king have advowson by reason of the temporalities of a bishop, and during the avoidance the king *restore* the bishop the temporalities, yet he (the king) shall present to the advowson, and not the bishop for this avoidance.” In this case the *restoration* of the temporalities of which the advowson is part, does not carry with it the presentation which has fallen while

the temporalities were in the king's hands, though it is said in the former part of the passage that a *grant* of the advowson would have that effect.

A difference, therefore, is taken between a grant of an advowson by the king, and a restoration of the temporalities including the advowson.

Moreover, it must be observed, that Sir Matthew Hale, in his notes on Fitz. N. B., does not implicitly adopt the position in the text, but cites some authorities to shew that even the *grant* of an advowson will not carry the presentation, unless there are special words of the avoidance in the grant.

His note is as follows:—“*Vide contra*, except there are special words of the avoidance, 16 H. 7. 8., Dyer, 282. 302 a. 348 a. And see accordant, 18 Ed. 3. 58 a.; but contrary in the case of a common person, 11 H. 4. 54 b. And an avoidance fallen is not *grantable* by a common person, Dyer, 283. 348., Staund. Prerog. 44., 46 Ed. 3. Grants, 50., 18 Ed. 3. 22. and in margin.”

Watson agrees with the suggestion of Hale, for he says, “If, when a church is void, the king *grants* a manor with all advowsons appendant, the void turn does not pass thereby, unless he also mention it in his grant,” chap. 10. And another case, arising upon a grant of the king, is stated in 2 Roll's Abr. 345., from which the distinct nature of the presentation strongly appears. “If the king has an advowson by reason of a wardship, and he grants to another during the minority of the ward, and after the church becomes void, and continues so until the ward attain his full age, whereby the interest of the grantee determines; yet the grantee shall have the presentation and not the king.” This case is analogous to that of the lessee of an advowson, whose interest having expired, he is entitled to present to a church which had become void during the term. But for the grant, the king would be entitled in preference to the heir; and by virtue of the grant, the grantee is entitled in preference both to the king and the heir.

I will trouble your Lordships with only one more instance, which occurred in the reign of Queen Elizabeth, to

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shew how clearly the right of presenting to a void church was considered as distinct from the advowson itself.

If an advowson comes to the queen for forfeiture by outlawry, and then the church becomes void and the queen presents, and then the outlawry is reversed for error, yet the queen shall enjoy the presentment, because it came to the queen as a profit of the advowson; but if the church be void at the time of the outlawry, and the presentment be forfeited as a chattel principal and distinct, and then the outlawry is reversed, the party shall have restitution of the presentment. *Beverly and Cornwall's case*, Moor 269.

Here the queen's right to the presentment, as a profit of the advowson while in her hands, is asserted in the first part of the case; and the subject's right to restitution of the presentment upon an avoidance before the outlawry is acknowledged in the latter part; because such right of presentment became a distinct chattel before the outlawry.

Secondly, I am now to consider the question with reference to the person (a prebendary of a cathedral church), to whom the right of presentation accrued.

A prebendary is a sole corporation existing by charter of foundation; or by prescription, which presumes a charter; and all the possessions of the prebend are derived either from the endowment of the founder, or of subsequent benefactors.

The right of presentation to a parish church must therefore have been derived mediately or immediately from the original patron of the living, who, as such, was seised of a temporal estate in the advowson.

The nature and incidents of that estate could not be changed by its transfer to any particular person or body politic.

What the heir of a natural person cannot take, will not go to the successor of a sole corporation. For (as it is said in 4 Co. 65. *Fulwood's case*), succession in a body politic is inheritance in the case of a body private.

And, therefore, in case of a sole corporation or body politic, be it created by charter or prescription, as bishop, parson, vicar, master of an hospital, &c. no chattel either

in action or possession shall go in succession, no more than the heir of a private man can have them; but the executors or administrators of the bishop, parson, &c. shall have them.

On this ground it is, that a bishop, parson, &c., or any sole corporation, which are bodies politic by prescription, cannot take a recognizance or obligation, but only in their private and not in their public capacity.

If, indeed, there be a custom that the successor of any particular corporation sole, as the chamberlain of London, shall have a recognizance acknowledged to his predecessor, he shall take it; because the same custom which made him a corporation in succession for the particular purpose, has enabled his successor to take recognizances, obligations, &c. made to his predecessor, in the absence of which he would not be entitled to do so.

The exception founded on custom in *The Chamberlain of London's* case, establishes the general rule in those cases in which custom cannot be relied on.

And, according to Sir E. Coke, in the case of bodies politic by prescription, "such as bishops, parsons, &c." (in which, &c. is manifestly included prebendaries), there wants such custom to take a chattel (or, as I apprehend, any interest distinct from the inheritance), in their politic or corporate capacity.

Independently, however, of this negative argument, arising from the incapacity of the successor, I am led to infer from analogy that the personal right of the prebendary, existing at the time when the church becomes void, is to be preferred to that of his successor.

The appendancy of an advowson to a manor is analogous to its union with a prebend. Yet, if the church is void, and the lord of the manor die leaving the church vacant, his executor, and not his heir, shall present.

The title of a husband in right of his wife, endowed of an advowson by a former husband, is not unlike the seisin of a prebendary in right of his prebend: yet, if the church become void during the coverture, and the second husband survive, he and not the heir of the first husband shall present: and if the second husband die before exercising

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his right, his executor would be entitled to stand in his place.

The ecclesiastical character of the prebendary does not appear to me to make any material difference between this case and that of any other corporation sole. A prebendary before the statute 13 & 14 *Car. 2. c. 4.* might have been a layman; a prebendary, as such, has no cure of souls, and was not obliged by the 13 *Eliz. c. 12.* to subscribe or read the thirty-nine articles. (Burn's *Eccl. Law*, vol. ii. 79.)

Nor would the ecclesiastical character, supposing the prebendary always to have been a priest in holy orders, necessarily entitle his successor to a right of nomination or presenting to a benefice accrued to him in right of his prebend.

The transmission of an archbishop's options to his personal representatives, and the right to dispose of them by will, is a strong instance to shew that a personal right, though arising from the ecclesiastical character, does not pass to the successor. Another strong instance is that mentioned by Fitzherbert, in his *Natura Brevium*, 34. N. "If a vicarage happens void, and before the parson presents, he is made a bishop, &c. yet he shall present unto this vicarage, because it was a chattel vested in him."

In this instance, the individual to whom the right accrued as parson, after having vacated the rectory by acceptance of other preferment, is allowed to present the vicar in preference to the successor in the rectory.

Whether the case here put was founded upon any actual decision, or only upon Fitzherbert's own understanding of the law prevailing in his own time, it has the sanction of his great name, and must be deemed of high authority.

One distinction, indeed, is recognised between lay and ecclesiastical patrons in respect to the right to vary a clerk presented. If an ecclesiastical patron once present a clerk, and then vary his presentation by presenting another, the bishop is not bound to receive either. Whereas, if a lay patron, having presented one clerk, afterwards present another, the bishop cannot absolutely refuse to institute, but may make his choice. The ground of which distinction is,

that the ecclesiastical patron has not the same excuse as the lay patron for omitting to ascertain the sufficiency of the clerk first presented. Keelway, 154. But this distinction has no bearing on the question of succession to the right of presentation.

It has been urged at your Lordships' bar, that where a judicial officer, entitled to appoint to some office, dies without having made an appointment, the successor in the office shall appoint.

The first answer to this case is, that such right of appointment is not property of any kind; and the next, that the same law, whether old or new, which has established the superior office, has regulated the right of appointment: in which respect, the case resembles that of the Chamberlain of London, the principle of which is, that the law which regulates the right of succession is coeval with the establishment of the office.

It now only remains for me, in the *third* place, to consider your Lordships' question with reference to the personal representatives of the deceased prebendary.

The right of the personal representatives of a natural person, where a right of presenting has accrued, was not disputed in argument.

It was admitted to be too firmly established upon authority to be now called in question, but it was contended to be an exception from the general rule of law, which ought not to be extended to a new case, the exception itself, though established, being, as it was said, inconvenient, and founded on a vicious principle.

I do not propose to offer to your Lordships any observation upon the convenience or inconvenience of the existing law, by which the personal representative, in ordinary cases, is preferred to the owner of the advowson; but if the view which I have taken of the right be at all correct, the law which prefers the personal representative is the general rule, and it lies on those who deny its application to the administrator of a prebendary to establish a ground of exception.

It may be admitted that the right of such administrators has never been the precise subject of any judicial decision.

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But little is to be inferred from that circumstance, either on one side or the other. If any argument is to be built upon the absence of litigation upon the subject, I should rather conclude that the general rule has prevailed, than that an exception to it had been admitted without dispute.

There can be no doubt that (generally speaking) the executor of a prebendary, as well as every other ecclesiastical corporation sole, takes the personal rights of his testator, whether in possession or in action, which accrued to the deceased in right of his prebend; such as the produce of the prebendal lands actually severed, or rent become due before the death of the prebendary.

So award, relief, heriot, &c. accruing from the prebendal lands, would pass as chattels to the executor; and the successor does not take any such rights or interests as are less than freehold.

Even if a bond be expressly given to a corporation sole, (as the dean of St. Paul's) 20 Ed. 4. 2. Bro. Corporations, 60., and to his successors, the successor shall not sue upon it, but the executor.

It is urged, however, that the right of presentation to a vacant church is not a matter of profit, and that the personal representative of the deceased prebendary ought not to take it, because it would not be assets.

But the same argument applies to the personal representatives of a natural person, in which case their title is admitted to be unimpeachable.

If the right of presentation be not part of the freehold, it cannot be exercised by the successor; by whom then should it be exercised but by the person who represents the personal interests of the deceased?

The title of a personal representative is not confined to those things which become assets in his hands.

All the personal estate of the deceased, whether held for his own benefit or for that of others, passes to his executor or administrator.

Terms for years producing no benefit, covenants and obligations for the benefit of strangers, vest in the personal representative.

If the patron be disturbed in presenting to a vacant

church, and die, his executor, and not his heir, must bring the writ of *quare impedit*.

It can scarcely be argued that the successor of a deceased prebendary, who was disturbed in his lifetime, could maintain such a writ; and if not, who but the executor could maintain it? and who is to have the writ to the bishop?

Moreover, it is to be recollected that in such an action damages are recoverable, and that such damages would be assets.

In *Smallwood v. The Bishop of Coventry*, Cro. Eliz. 207, it was expressly held by the justices, that this action was within the equity of the statute of the 4 Ed. 3., for the presentment is a chattel that should go to the executors if the disturbance had not been; and for a disturbance in their own time, they shall recover damages to the use of the testator: by the same reason, for a disturbance in the time of the testator, they shall recover damages by the equity of the stat. 4 Ed. 3. And according to the report of the same case in Saville, 118., it was held, with reference to the objection that the presentment could not be assets, that every thing which the law gives by execution should be said to be valuable, and consequently assets; that by recovery in *quare impedit* the damages would be assets; and so, as the advowson is assets in the heir, the presentment shall be in the executor.

Will it be said that such assets belong to the successor of a prebendary, or that he, rather than the executor, is to sue for them for the benefit of the deceased's personal estate?

It has been objected in argument against the right of the personal representative, that he cannot present in right of the prebend, yet that he ought to present in that right in which the deceased prebendary must have presented.

But the same difficulty, if it be one, would apply to the case of a husband, who, though not tenant by the courtesy, presents after his wife's death in respect of an advowson vested in the wife, to a living becoming vacant during the coverture; and also to the case mentioned by Fitzherbert,

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of a parson to whom a right of presenting to a vicarage has accrued in right of his church, and who presents a vicar after having vacated his rectory by promotion.

In both these cases, the title which accrued *alieno jure* is asserted by the presentor as a personal right vested in the individual to whom it accrued.

The observations which I have submitted to your Lordships have been confined to the case of a presentative advowson; the object of your Lordships' question being in terms, a right of presentation.

The case of a donative advowson, in which there is no presentation to the bishop, stands altogether upon a different ground; not forming, as I conceive, any exception to the general rule which has been mentioned, but being of a nature to which the rule is inapplicable.

The principle of the rule which carries the right of presenting to the executor is, that the right which accrued to the testator as patron is become distinct from the advowson.

It belongs to the patron for a limited time only, which time is independent of his interest in the advowson. If not exercised within six months, it passes as a separate and distinct interest to the bishop; and if not exercised by the bishop within six months more, it passes in like manner to the king; neither the bishop nor the king having any interest in the advowson.

In the case of a donative, the right of presenting is subject to no limitation: though the patron forbear to fill the church for any length of time, his right is not lost, it does not pass from him to the bishop, or to the king, or to any other person; and if he never fill the church at all, the common law has made no regular provision for compelling him to do so.

So different is the right of the patron of a donative from that of a presentative advowson, that even during the incumbency the sole right of visitation and correction continues in the patron, independent of the jurisdiction of the ordinary. The patron alone can deprive the incumbent, and it is to him that resignation must be made.

It is unnecessary here to consider whether, by the spi-

ritual court, or by any other means, the owner of a donative might be obliged to supply a minister for the service of the church upon the ground of his having dedicated the church to the public for spiritual purposes; for admitting such obligation to lie upon the patron, yet during the vacancy of a donative, either by death, resignation, or otherwise, the freehold of the church of the glebe and of the tithes reverts to the patron and remains in him, till by a new gift he confers it on a new incumbent; and it would therefore be inconsistent with this title of the patron that any other person should have a right to divest his freehold by collation.

For these reasons I am of opinion, that where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative.

Bolland B. — It is highly probable that the state of facts, out of which this question arises, has in very many instances existed; and it is remarkable that no light is thrown upon the subject by any decision at law, nor by any practice of the church upon a presentation to a benefice under circumstances precisely similar to the present. If any such decision exists, it has escaped the industry of the experienced counsel, who argued this case in the Courts below, and at the bar of this House, and the researches of the learned Judges of those Courts, whose enquiries were so sedulously directed to the discovery of some authority, upon which their judgment might be founded. It is to principle, therefore, and to cases analogous to the present, that the attention is to be turned, in order to arrive at a satisfactory conclusion.

In pursuing this enquiry, I do not mean to dispute that by the law, as it stands, if a presentative church, the advowson of which belongs to a layman, become vacant, and the lay patron die without presenting, his executor shall present, and not his heir or devisee, or the next owner of the advowson, it being considered that the next turn is a chattel; though this seems to have been doubted

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in the case of the *Queen v. The Archbishop of Canterbury, Fane and Hudson*, and the Court left it undecided. The report is to be found in the 1 Leon. 201. The distinction which I shall endeavour to make will be that the right of the owner of an advowson *does* depend, though the contrary is contended for on the part of the defendant in error, upon the character in which he holds; and that as the deceased was seised of and in the prebend of South Grantham with its appurtenances, to which prebend the advowson of the rectory of the parish church of Welby with its appurtenances belonged, in his demesne as of fee, in right of the said prebend; the right of presentation to the church, when it should become vacant, arose out of his office of prebendary, — was a spiritual trust to be executed for the support of and for the promotion of the welfare of the established religion, — and that to him, and to him alone was confided the choice and appointment of an incumbent.

It appears from history that for six or seven centuries the parochia was the diocese or episcopal district; there was the residence of the bishop and his clergy at the cathedral church; all tithes, offerings, and ecclesiastical profits belonged to the bishop and his clergy for their support, for the repairs and ornaments of the church, and for other works of piety and charity. Such community and collegiate life of the bishop and his clergy was the practice of the British, and was afterwards adopted by the Saxon church.

Many causes contributed to the existence of parochial churches. In some places the liberality of the inhabitants raised them, and by supplying preachers with houses induced them to settle and become the pastors; kings founded free chapels for the purpose of worship for their court and retinue. The bishops, too, to plant and encourage Christianity amongst the people, built churches; but the great source from whence the increase of the number of buildings for divine worship arose was the piety of the great lords, who having large possessions and territories, founded churches for the use of their families and tenants within their respective domains, and hence it seems a title to patronage in laymen first sprung. Hence the boundaries

of parishes became commensurate with the extent of manors; hence the several portions of the same church were divided according to the separate interests of the several lords.


But although for the purpose, and in the hope of more firmly establishing religion, and more widely extending its divine influence, these changes in its constitution and management were permitted by the church, the right of the bishop either in respect of spirituals or temporals was not invaded. He still had the cure of souls, and a title to all the ecclesiastical revenues within his whole diocese; by his authority and consent priests were ordained, as assistants given to him; no church could be used for public worship till consecrated by him; no priest could officiate there without his delegation.

From the causes I have above stated, the privilege of nominating fit persons to officiate in churches which the piety and liberality of private persons had founded or endowed was given; and the bishops were content, in such cases, to forego the privilege of appointing the ministers, who were to perform the duties in such churches; this power was conceded to the founders or benefactors of such churches, *ratione fundationis*, where they were founders; *ratione donationis*, where they endowed the churches; and *ratione fundi*, where they gave the soil upon which they were built: the bishops reserving only the power of deciding upon the fitness of the persons nominated, 1 Co. Litt. 119. 6. In process of time, this practice became the law of the church. The church having made these concessions and having thus parted with the right of presenting, it became a matter of indifference to the bishops, whether, upon the death of the lay owner of an advowson, during the vacancy of the church belonging to it, the right that the patron, had he lived, would have exercised, should go to his heir, or should belong to his executor: the church left that question to the courts of law to determine; and I am bound to admit, that in such cases the claim of the executor is established. But I cannot apply that rule to the case in question, because the advowson of which the late prebendary of Grantham was seised was given to him as a member

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of the church of Salisbury, was appendant to an ecclesiastical dignity, and is not to be governed by the same law as is applicable to advowsons in lay hands.

If I am wrong in taking this view of the question, the error arises from my considering the right of the executor of a lay patron to be an exception from the rule which governed property of this description in the hands of the church, as there appears to be a manifest distinction between lay and spiritual property.

In the note upon the 10th section of Littleton, 1 Ins. 17.6. it is said “of an advowson wherein a man hath an absolute ownership and property as he hath in lands and rents, yet he shall not plead that he is seised *in dominico suo et de feodo*, because that inheritance savouring not *de dono* cannot either serve for the sustentation of him and his household, nor can any thing be received for the same for defraying the charges, and therefore he cannot say that he is seised therein *in dominico suo de feodo*.” In the section of Littleton, upon which this is a commentary, the author is treating of an advowson in lay hands; and these authorities are adduced by Gibson in his Codex, p. 757. in speaking of spiritual property, to illustrate the difference he points out. In the pleadings in the present case, the prebendary is alleged to be seised of the advowson in his demesne as of fee; and why is it so pleaded? The answer is, it is not a lay title; but that, to use the language of Coke, it savours *de dono*, may be made serviceable for the sustentation of him, as a spiritual person, and his household. The case of *Loudon v. The Collegiate Chapter of the Collegiate Church of Southwell*, Hob. 304. is a further proof of the distinction I have taken, between lay and spiritual property.

I shall next call the attention of your Lordships to the ecclesiastical character of the officer, in whom till his death, it cannot be denied, the right of presentation was vested; to the object of the founder of the prebend; and to the nature of the property with which he endowed it.

A prebend, as defined by Dr. Cowel, is the portion which every member or canon of a cathedral church receiveth in the right of his place for his maintenance; so

canonica portio is properly used for that share which every canon or prebendary receiveth out of the common stock of the church; and *prebenda* is a several benefice rising from some temporal land or church, appropriated towards the maintenance of a clerk or member of a collegiate church, and is commonly named of the place where the profit groweth. And these prebends be either simple or with dignity. Simple prebends be those that have no more than the revenue towards their maintenance; prebends with dignity are such as have jurisdiction annexed to them, according to the divers orders in every church.

The object of the founders of prebends, there cannot be a doubt, was to provide for the maintenance and support of the prebendary; and it cannot be supposed that it was the intention of any founder that the emoluments of the prebend should be appropriated beyond the life of the party in possession. I shall not stop to enquire whether this charitable intention of founders has not been in a great measure defeated; but I shall confine myself to the consideration of, whether the particular right contended for by the executrix is founded upon any decision in the law, or can be supported upon principle.

It is admitted on all hands, that no authority is to be found on the subject. Let us then look to the character of the person, under whom the right to present to the church of Welby is claimed by the defendant in error. He was an ecclesiastic: as a layman, he could not at this day have enjoyed the dignity; the office was conferred on him by the church, its emoluments and profits were intended by the founder for his support, to him was confided the sacred trust of providing a proper minister for the church, appendant to his prebend. Looking back to the times when similar benefactions were bestowed upon the church, no one can hesitate to be convinced that the founder of the prebend of South Grantham intended the prebendary to become incumbent to the church, or at least that he should (unless provided for in such a manner as to render the living of Welby untenable,) have the power of being so. The selection of the prebendary by the bishop is a voucher for his piety, and a sanction and authority to

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him that, in presenting himself, or any other clerk, the true interests of religion would be promoted. Can it be contended that the trust can be carried further? To do so is to put into the hands of a stranger to the church a trust, the execution of which was confided to a member of its own body, is to divert the course of the founder's bounty into a different channel from that in which he intended it should flow, and to establish a precedent by which the best interests of the church (I admit the instances would probably be few) might be affected.

If I am correct in considering an advowson in the hands of a prebendary in right of his prebend as a spiritual trust, which is vested in him *jure ecclesiæ*, it should be enquired whether such a trust can be transferred to another, or whether it survives, and will go to the representative of the deceased person in whom it was placed. I find in Hob. 154. *Colt and Another v. The Bishop of Lichfield and Coventry*, it is said that "if a lapse occur, and then the ordinary die, the king shall present, and not the executors of the ordinary; for it is rather an administration than an interest." Fitz. Nat. Brev. 34. G. 25 Ed. 3. 24. Dyer, 87. The case of Merton College is doubtful, whether to the king or to the metropolitan. So again Hob. 154. "A lapse, as I have said, is an act and office of trust reposed by law in the ordinary, metropolitan, and, lastly, in the king; the end of which trust is to provide the church of a rector in default of a patron, and yet as for him, and to his behoof; and therefore, as he cannot transfer his trust to another, so cannot he divert the thing wherewith he is trusted to any other purpose." The reason given by the learned judge, why the presentation does not go to the executor of the ordinary, viz. that it is an administration rather than interest, appears to me mainly to fortify the position for which I am contending.

I cannot fail, also, to pray in aid the weight that is to be derived from the further consideration of the legal character of a prebendary. He is an ecclesiastical sole corporation, and as such he can have no heir nor personal representative. To his natural heir his prebendary rights cannot pass, nor can they vest in his personal representative; but the right

of presenting to the vacant church must remain unsevered, and in abeyance, till the appointment of a successor.

In treating this matter, I have not commented upon nor attempted to remove the effect of those arguments, which have been drawn from several of the authorities that have been relied upon in support of the claim of the defendant in error, because, as they have proceeded upon lay patronage, they have, in the view which I have taken of the subject, no bearing upon the question.

From what I have said, your Lordships will have collected that the opinion to which I have come is, that the right of presentation to the vacant church of Welby does not belong to the personal representative of the deceased prebendary.

J. Parke J.—To the question which your Lordships have been pleased to refer to the Judges, I answer, that, in my opinion, the right of presentation belongs to the personal representatives of the deceased prebendary.

The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them of any of our Judges, or of those ancient text writers to whom we look up as authorities. The case, therefore, is in some sense *new*, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not *as* convenient and reasonable as we ourselves could have devised. It appears to me to be of

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great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

I propose, therefore, to enquire, by reference to those sources from which we usually derive them, what the rules and maxims of the common law upon this subject are; and it will be found that there is little difficulty in the enquiry, and none, as it seems to me, in their application to the facts under consideration.

The decision of the present case depends upon two propositions, both of which appear to me to be established by authority, and neither of which can be shewn to be unreasonable or inconvenient.

First, that in every *presentative* benefice the void turn is a personal right or interest, which is disannexed from the estate in the advowson, and vested in the person of the individual to whom the advowson then belongs.

Secondly, that, whether valuable in a pecuniary point of view or not, all personal rights and interests of the nature of property, and which are not extinguished by death, (with some exceptions, which are easily explained, and which have no bearing upon the present case,) vest on the death of the owner in his *personal* representatives.

The first of these two propositions, I say, will be found to be supported by authority; for in every case which is reported, and in every book in which the subject has been treated of or mentioned, as far as I have been able to discover, the void turn, or right of presenting to a vacant *presentative* benefice, is either expressly stated to be a personal right or interest, under a considerable variety of description, or the cases mentioned are capable of a satisfactory explanation upon that supposition only.

It is true that the great majority of the authorities to which I refer relate to benefices in lay hands, but *all do not*; and there is no one case, text book, or *dictum*, of which I am aware, in which any intimation is conveyed that there *is any exception* to this general rule. Surely it is impossible to argue, with such a constant, uniform, and unvarying course of precedent on one side, in all cases in which the subject has been in question, and in the absence


of all authority for such an anomaly on the other, that the case of an advowson in spiritual hands is an exception to the general rule: and if the absence of authority were not sufficient, it seems impossible to shew in what way the exception could have arisen.

I have said that this rule exists in all *presentative* benefices, and I confine it to these; for *donatives* are a very different species of property, and are governed by different rules. This subject is most clearly explained, and all the authorities referred to, in the very learned judgment of my brother Littledale in the Court below (7 Barn. & Cresswell, 145.), and it is enough to say the result is, that in donatives the complete dominion over the vacant benefice, and the freehold in it, remains in the patron, together with the right to take the intermediate profits until it is again granted out by him to a new incumbent in the nature of a new investiture. This freehold, in the case of the death of the patron during a vacancy, of course passes to the heir.

I do not propose to occupy your Lordships' time by citing all the authorities, to prove that the void turn of a presentative benefice is a personal right or interest. They have been all referred to in the arguments at your Lordships' bar, and in those in the Court below.

In some cases this interest is called "a chose in action," *Leach v. Babbington*, Cro. Eliz. 811.; in some "a chattel," as by Periam, Justice, in the *Queen's, Fane's*, and the *Archbishop of Canterbury's* case, 4 Leon. 109. In others, as in Fitz. N. B. *Quare Impedit*, 34 N. and 3 Keble, 152., "a chattel vested;" a "personal chattel," Vin. Abr. Executor, Z. 2. pl. 4. note; "a chattel vested and severed from the manor," Fitz. N. B. 33 P. In one it is called "a personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy;" also "a thing in right, power, and authority;" and also a "*chose in action*, and in effect the *fruit and execution* of the advowson, and not any advowson," by six justices, in *Stephens v. Wall*, Dyer, 283 a. In 3 Leon. 256. "a power to present and an authority annexed to the person." In

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Digby v. Fitch, Brownlow & Goulsborough, 167., Justice Warburton said, "The presentment is the possession in "*quare impedit*, as in rent, the reserving; in common, the "taking of the profits." In *Brooksby v. Wickham*, 1 Leon. 167., it is also compared to rent; and this analogy will be found to be the most perfect. The advowson is the estate, which descends, may be conveyed, limited, and escheats as such; the presentation is the mode of enjoyment, the profit or rent of the estate, and, like the rent or profit, belongs to the owner of the estate at the time it accrues, in the nature of a personal chattel, distinct and severed from the inheritance; it belongs to him, not as owner, but as an individual.

These authorities, in which the right of presenting on a void turn is treated as a personal right, are not confined to the case of passing to the executor in the event of the patron's death during vacancy. There are many others, in which it is so treated. A termor in the advowson has a right to present, though after the term has expired, to a vacancy which happened during the term, Fitz. N. B. *Quare Impedit*, 33 A., Brooke *Presentation à l'Eglise*, 22.; and he would be equally entitled to the rents in arrear of an estate granted for the same term.

A husband is entitled to present after his wife's death in an avoidance during his wife's lifetime of a church of which she had the advowson; Co. Litt. 120. a. Brook. *Present. à l'Eglise*, pl. 22., as he would also be entitled to the arrears of rent of his wife's estate. It is incapable of being assigned (Dyer 288. b.) or released by one joint tenant to another (1 Leon. 167.) as arrearages of rent are. If the patron be outlawed, in trespass, the church being void, the king is entitled, as to the other goods and chattels of the outlaw, and as he would be to the rents of his lands, Brooke *Present. à l'Eglise*, 22. Fitz. N. B. 34 Q. All these are cases of advowsons in lay hands, but a void turn is treated in one case as a personal right, disannexed from the advowson, when in spiritual hands. In Fitz. N. B. 34 N., it is said that if a vicarage happen void, and before the parson present, he is made a bishop, &c. yet he shall present

unto this vicarage, *for it was a chattel vested in him.* All the authorities, which I have cited are uniform, (and many others might be adduced) to shew that the right of presentation is a personal right, disconnected from the estate of the advowson, and belongs to the person of the owner; and the last applies to the case of a spiritual person, and is in point.

But on the part of the successor, it is argued, so far as his case is put upon the ground of authority, that the last case is single and unsupported; and that all the others are anomalies; that, in truth, the general rule is, that the void turn continues part of the advowson; that these exceptions have been introduced in all cases of lay patronage without any reason at all, though they have been too firmly established by authority to be now disturbed; but that the *general rule* still continues, and ought to be maintained, in the case of spiritual advowsons. Of course, the burthen of proving the existence of this rule lies on those who assert it; but the singularity of this argument, which was urged at your Lordships' bar, is, that whilst it treats all the cases in the reports and books as anomalies and exceptions to a supposed general rule, without the least authority for stating that they are exceptions and anomalies, it asserts the general rule, as will be found, without any authority for it; for there is no one case or dictum cited, which makes any mention of such a general rule.

But it is contended, that it must be *implied* that there is such a rule, from four cases, which lead to the inference that the next turn continues part of the advowson.

One was, where the incumbent was also patron, *Hall v. Bishop of Winton*, 3 Lev. 47., and died seised in fee of the advowson, the heir was held entitled to present, and it was said that this must be, because the turn continued a part of the advowson. But this case was decided, not on the ground of the next turn continuing parcel of the advowson, but expressly on the ground, that the descent to the heir, and the fall of the avoidance to the executor, happened in one instant, and that the more elder right should be preferred. The general nature of the interest, which arises on an avoidance, was distinctly admitted, and the right of the

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heir put upon a ground which is perfectly consistent with it.

Two other cases from which this inference was raised were those referred to in Co. Litt. 388 a. A bishop dies, a church being vacant in his life; and after his decease, the king shall present, and not the executor or administrator. So also in the case of the death of a tenant by knight service *in capite*, with an advowson appendant, which has become void in his life, his heir within age, the king presents and not the executor or administrator; and this is said to be another proof, that the void turn is still a part of the advowson. But though the king omit to present till he restore to the bishop his temporalities, or till the heir be of age and sue his livery and hath it, the king still has the right to present: and this shews, that in neither case the void turn *remains parcel* of the advowson, and belongs to the person who is owner of it. For both these positions, Fitz. N. B. 33 N. O. is authority. Besides, it is said in Co. Litt. 388 a., that if the land be holden of a common person, in that case *the executor* shall present: but if the void turn were still part of the advowson, why should not a common person, as well as the king, who both take the advowson, exercise this right?

It is quite clear, therefore, that neither of these cases can be explained by the supposed rule. We must look for another explanation. Both are clearly referable to the king's prerogative, which entitles him, in these special cases, to this personal interest. It should be observed, also, that Rolle Abr. *Present. à l'Eglise*, c. pl. 4., and Bro. *Present. à l'Eglise*, 10., which state that the king is entitled, both state *that the bishop's executors are not*, which shews that these great lawyers thought the void turn was disannexed, and that the successor, at all events, had no right whatever.

A fourth case, from which the inference of this continuance of the void turn as part of the advowson was deduced, was that of a conveyance by the crown of an advowson, whilst the church was void, which, according to Fitz. N. B. 33 N., passes the void turn. Admitting that authority to be correct, (and it is doubtful, from what is said upon this subject in Dyer 328 b.) it is a question only

as to the effect of the *king's grant*, and never could have arisen unless the void turn had been severed and distinct from the advowson.

The case, in truth, amounts to no more than this, that the grant of an advowson, which involves in it every present and future right of presentation, passes in the case of the crown the next presentation to a void living; which the crown *can grant* (Dyer 283 a.); though, in the case of a subject, it would not, for a subject cannot grant over such a personal right.

None of those four cases, therefore, which are relied upon as proofs of the existence of this supposed rule (and there are no others), in reality prove it at all; and all are capable of being satisfactorily explained upon another supposition.

There is, therefore, as it appears to me, a great body of authority in favour of the position, that the void turn is a personal right *in all cases*; and when the cases are investigated, a total absence of authority to the contrary.

If it be conceded that this interest is of a personal nature, and dissevered from the advowson *in all cases*, it must be contended that, in the case of a spiritual person, this personal interest or chattel will go by succession. But that is a violation of the established rule, that a corporation sole cannot take a chattel by succession, whether in possession or action: *Fulwood's case*, 4 Coke 450. and no authority can be cited that this special chattel interest is an exception.

I have shewn, therefore, that there is no authority for the alleged general rule, that the void turn continues annexed to the advowson, and is not of a personal nature; and if it be of a personal nature, there is not only no authority, but it is against the rules of law that it should pass to a successor.

Upon the hypothesis in favour of the successor, all the decided cases are anomalies; upon that made by the personal representatives, that the right of presenting is, in all cases, both of lay and spiritual patronage, a personal interest, we have a uniform and consistent system. As this right, when in lay hands, is analogous to rent in the case

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of land; so it is when the advowson is in spiritual hands; and as a parson or prebendary, who resigns, or his executor, when he dies, is clearly entitled to arrearages of rent and profits which accrued before his resignation or death (Fitz. N. B. 122 D. 120 L. 19 Hen. 6. 44.); so he or his personal representative ought to be entitled to the right of presenting, which fell during the same period.

Besides, if this anomalous principle is introduced on the ground of the *spiritual* character of the prebendary, what is to be said of it whilst the prebend was in lay hands, which it clearly might have been before the act of uniformity, according to the case of *Bland v. Maddox*, Cro. Eliz. 79: Is the void turn to be dissevered or not, according as the prebendary is a layman or ecclesiastic?

It is said, that this patronage is so annexed to this spiritual corporation, as to be incapable of separation from it: but not only is there no authority for this position, but many precedents are against it, in which bishops, and other ecclesiastical corporations sole, have granted away their right to laymen; which grants have been considered good against themselves. I need not refer your Lordships to the authorities, further than by saying, that they are collected in the reported cases in the courts below.

And, indeed, I am at a loss to see in what way the alleged difference, if there be one, between the qualities of an advowson in lay hands, and in those of a spiritual proprietor, could have arisen. It is highly probable, to say the least of it, that all rectories were originally created in the hands of laymen, who received the patronage from the bishop in lieu of those lands which they granted on the foundation or endowment of a church; and if this be so, what is there to raise the presumption that when they afterwards granted these advowsons to the church, they wished them to have new properties and qualities different from those they had in their own hands; or, if they did wish it, what power had they to communicate them? They could no more alter the rules of law, and make chattel interests be taken in succession by a corporation sole, than they could make the estate in a freehold descend to executors. Succession in a body politic is inheritance in a body private,

(*Fullwood's case*, 4 Coke 646.); and no grantor can, however much he may wish it, limit his estate against the rules of law.

And supposing that there were instances in which a bishop or other ecclesiastical person, and not a layman, had originally founded or endowed a church out of the lands belonging to him in that character, and became the proprietor of the advowson which he or his successor had granted to the prebendary, the same difficulty occurs in proving the intention of the donor, and a similar difficulty in carrying that intention into effect; and if these difficulties are overcome, the alleged difference in the quality of lay and spiritual advowsons must, at all events, be confined to those very special cases, exclusive of all others.

The next proposition which the authorities establish, is, that all personal rights and interests, of the nature of property, and which are not extinguished by death, vest, on the decease of the owner, (with some few exceptions,) in his personal representatives.

The executors or administrators are not constituted for the purpose of paying the debts of the deceased; their liability to those debts is a *consequence* of their representative character. Litt. s. 337. says, that "Executors *represent the person* of their testator." So Yelverton, 103. is to the same purpose, "He is, in law, the testator's assignee." Wentworth, Off. Ex. 100., as to the estate committed to his trust, he may charge others, and be charged himself; sue and be sued, as the testator himself might, Sheppard's Fouch. 401. Executors take, therefore, all the personal estate and interest of the testator, and are identified with him in respect to all personal property; but their obligation to pay debts is only to the extent of the value of those effects which are valuable. They have all the deceased's effects, but they are liable only for *assets*.

It is a fallacy to suppose that they take nothing but what is valuable; and, therefore, do not take rights of presentation to void benefices. A fallacy which has led to the argument, that all the cases in which a personal representative has taken a void turn, which certainly cannot be sold, are unreasonable anomalies.

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The 31 *Ed. 3. s. 1. c. 11.* puts administrators, who are the deputies of the ordinary, on the same footing as executors; *vide* also Sheph. Touch. 401.

To this rule, that the personal representatives take all the personal rights of the deceased of the nature of property, there are some exceptions, which the common law, in the case of private individuals, or the king's prerogative right, have established.

Chattels touching the realty, deer in a park, fish in a pond, evidences of title, heir looms, which go to the real representative, and the analogous case of the ornaments of a bishop's chapel, which pass to the successor, are of the former description; the right of the crown to the void turn, in the case of the tenant *in capite*, and the bishop, stated by Coke, p. 388 a., are instances of the latter: and it is to be observed, that both those instances are put by him as exceptions to the general rule "that chattels, as well real as personal, shall go to the executors or administrators."

None of the excepted cases have any bearing upon this; and there is no mention any where made of an exception of the right in question, when in spiritual hands: and it would violate the rule of law, as to succession by a corporation sole to chattels, if it did.

I must own that it appears to me to be quite clear, that if this case is to be decided, as I conceive all similar cases ought to be, according to the rules deduced from former decisions and legal precedents and principles, there is no doubt as to the right of the personal representative of the prebendary to present to the void living. These rules cannot be shewn to be *contrary* to sound reason and just policy. We are not enquiring whether other rules might or might not have been more wise or reasonable, and whether the heir in the case of lay property, and the successor in that of spiritual property, might or might not have been likely to exercise the right of presentation more beneficially to the public interests.

If such an alteration is proper, and it is not my province to enquire whether it is, it must be made by the legislature. What ground has a judge, says Lord Keeper Henley, to

alter the law, because he cannot approve the reasons that others have given, or may not be able to assign a satisfactory one himself? At present the system is, at all events, uniform and consistent, and uniformity and consistency ought not to be lightly sacrificed.

The law of England, which has treated from the first advowsons as property, the founders or benefactors of churches having had the patronage granted to them as property for a valuable consideration, has not relied upon the *person or character* of the patron for the due exercise of the trust, but has adopted other securities for that important purpose. The incorrupt exercise of the trust is secured by the penalties against simony; and the selection of a fit clerk, by the examination of the ordinary. Subject to these provisions, it has left the patronage of churches to descend, be limited, and enjoyed like other real property.

For these reasons, I am of opinion that the right to present to the void turn passed to the personal representative of the deceased prebendary.

Gaselee J. — This, my Lords, is not the first occasion on which my attention has been called to this question. Your Lordships are aware that in the case out of which it arises there have been conflicting judgments in the Courts of King's Bench and Common Pleas, and that full reports of these judgments are to be found in 3 Bingh. 223., 11 B. Moore, 139., and 7 Barn. & C. 153.

The case has been since very fully and ably argued at your Lordships' bar, and in the course of the several discussions which it has undergone, I believe every authority that can be brought to bear upon the subject has been cited; and they are all mentioned in the reports I have alluded to.

I shall therefore not trouble your Lordships with going through them at length, but shall state, as shortly as I can, the grounds upon which I found my answer to your Lordships' question in the affirmative.

It is extraordinary that, although cases similar to the present must have happened, there are no traces of any such having been made the subject of legal investigation;

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nor, upon the best enquiry that I can make, have I been able to ascertain what the practice in such cases has been.

It is admitted that the general rule with respect to presentative livings is, that if after a vacancy the patron of the advowson dies without having presented, the right of presentation to the vacant turn belongs to the personal representative, and not to the heir of the patron: and the reason given in the books for this is, that it is a fruit fallen, a chattel severed from the inheritance, or, in other words, that the moment a church becomes vacant the turn is separated and disannexed from the advowson, and is vested in the person of the individual to whom the advowson at that instant belongs; see 4 Leon. 109., Fitz. N. B., 83 P., 84 B. and 84 N. P., and many other authorities; and it is so far considered as disannexed from the inheritance, that the grant of an advowson during the vacancy does not carry the vacant turn. Where the husband is tenant by the courtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir of the wife, who takes the advowson, shall not have the vacant turn, but the husband's executors. So, where the wife is seized of the advowson, and, the church being void, dies without having had issue, so that the husband is not tenant by the courtesy, yet the husband shall present to the vacant turn, and not the heir of the wife. Again, in the case of a termor, if a vacancy happens during the term, and he does not fill it up during the continuance of the term, he is entitled to do so after its expiration. And there are many cases which decide, that although the grant of the next presentation be made to a man and his heirs, yet it shall go to his executors and not to the heir.

But it is said there are exceptions to this general rule: one of which is, that where the patron is the incumbent, the vacancy occasioned by his death shall not be filled up by his executors, but by his heir upon whom the advowson descends; and for this is cited the case of *Hall v. The Bishop of Winchester*, 3 Lev. 47. But what is the reason given by the Court for this? It is, that all is done in an instant, the descent to the heir and the falling of the ad-


advowson to the executor; and that, where two titles do accrue in the same instant, the elder shall be preferred. As in the case of joint tenancy, where one devises his part, the title of the devisee and of the survivor happens in the same instant, and the title of the survivor being the elder, shall be preferred.

Another exception is where the patron is a bishop, and entitled to the living in right of his see; in which case, if the bishop dies after the vacancy, and before it is filled up, the king, and not the executors of the bishop, shall present. Various reasons are given in the books for this; one is said to be, for that nothing can be taken for the presentation, and, therefore, it is not assets. This surely cannot be the reason; for if it were, it would apply to every case, and entirely do away with what is admitted to be the general rule in presentative livings. Another reason given is, that it is a spiritual trust; and, consequently, on the vacancy of the see, vested in the king as the supreme patron and head of the church. Is that the reason? The vacant turn is, by all the authorities, considered as part of the temporalities of the see. The king takes it as such. It passes to a third person by the grant of the temporalities, and nothing can be more strong to shew that it is considered as disannexed from the advowson than that, if the vacancy remains unfilled, not only until after the consecration of the new bishop, but after restitution of the temporalities, the vacancy is still to be supplied by the king or his grantee, and not by the new bishop, to whom, if not considered as so disannexed, it would naturally pass as part of the advowson. The rights of the crown upon this subject are stated in Watson's Complete Incumbent, cap. 9. p. 48. If the rule be, that all ecclesiastical patronage is a spiritual trust, and cannot be transferred into lay hands, what becomes of the case of an archbishop's options, which are to all purposes considered as chattels and his personal property. He may devise them, and if he does not, they pass to his personal representative. It is true, that after the vacancy happens, the options cannot be sold; and, although it cannot be supposed that any archbishop would sell it during his lifetime, yet there may be cases in

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which his executor or administrator might be compelled to do so before a vacancy happens; as, for instance, on the application of a residuary legatee, or one of the next of kin.

A distinction is attempted to be made between ecclesiastical and lay patronage, because it is said, that in the latter the church is secure from an improper person being presented by the bishop's right to refuse the party presented. But there is, in fact, no ground for this distinction. In this very case, the administratrix claims only to present. The bishop of Lincoln is to judge of the fitness of the person presented. And so it is in all presentative livings, whether of ecclesiastical or lay patronage. The bishop of the diocese, in which the benefice is situate, is to examine and decide upon the fitness of the presentee. I am not aware of any authority which has determined that a grant by an ecclesiastical patron of a presentative living, to which he was entitled in respect of his ecclesiastical preferment, is void, although, of course, he cannot grant it beyond his own life. In Watson, p. 53. it is said to have been held, that a grant by a bishop of an archdeaconry for twenty-one years, though void against the successor and the king, is good as against himself. And many of such grants in ancient times are to be found in the books of entries; I will not trespass upon your Lordships' time by stating them at length, but merely refer to the books where they are to be found: *The King v. The Abbot of — and Another*, Vet. Intr. 110., *Stanhope v. Bishop of London and Others*, Winch. 285. Hob. 237., *Webster v. Archbishop of York and Woodroffe*, Co. Ent. 507., *Hill v. Bishop of London and Others*, Co. Ent. 508., *Adamson v. Bishop of Lincoln and Others*, 2 Brown, 233. Rastall, 522. *Overton v. Syddal*, Co. Ent. 122., *Byng v. Bishop of Lincoln*, Winch. 853. Although there does not appear to have been any decision in these cases, yet Mr. Justice Ashhurst, in 2 Term Rep. 636., says that the forms of legal proceedings are evidence of what the law is. In one case, indeed, that of *London v. Southwell*, Hob. 304., the pleadings of which are in Winch's Entries, 810., it was held that an advowson did not pass by a lease made by a prebendary, not because the grant of an advowson by

a spiritual person was illegal, which, if the law were so, would have been a short answer to the case, but because the words of the lease were not sufficient to comprise it. And in the case of *Armiger v. Bishop of Norwich and Holland*, the Court said, that the grant by a bishop of an advowson, though void, under the 1 Eliz. c. 19., against the successor and the queen, was good against the bishop whilst he continued to hold the see. And in *Poyner v. Charlton*, Dyer, 135., it appears that the grantee of a dean and chapter of the next avoidance recovered it in *quare impedit*. Much stress has been laid by the counsel for the Plaintiff in error, on the case of *Repington v. Governors of Tamworth School*, 2 Wilson, 150., in which it was held, that in the case of a donative, the right of donation descends to the heir, and that the executor has no title, which the Court said he would have had if it had been a presentative living. This case is so very miserably and scantily reported, that it is impossible to ascertain the grounds of the decision. It does not militate against the general rule which I have stated in the early part of what I have addressed to your Lordships' notice, as I have above stated, the Court in giving their judgment said that the case of *Repington v. The Governors of Tamworth School*, would have governed this case, if it had been one of a presentative living.

Another ground of objection taken to the Plaintiff's claim is, that admitting the vacant turn to be a chattel, still the Plaintiff is not entitled to present, because it is said the prebendary is a sole corporation, and that a sole corporation cannot take a chattel by succession, except in the case of the king.

That a sole corporation, except in the case of the king, cannot take a chattel in succession, is true; but what appears to be the fallacy of the argument in this part of the case is, that the prebendary did not take the void turn by succession. The advowson goes to the next prebendary by succession; and if the void turn went with it, it must be as a part of the advowson; for if disannexed from it, and a chattel, as it is stated by the authorities to be, he could not take it. It appears to me however, that the moment the vacancy happens, it becomes a chattel vested in the

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then prebendary in his individual capacity, and passes to his representatives in the same manner as rent or any other fruit of the prebend which has accrued or fallen during his lifetime; and for this I would refer to the case cited in Mr. Justice Holroyd's judgment, from Co. Lit. 99 a., and to the passage in Fitz. N. B. 34. N., that if a vicarage happen to be void, and before the parson presents he be made a bishop, yet he shall present to the vicarage, because it was a chattel vested in him.

With respect to any distinction that arises from the form of the presentation of the last incumbent, which is set out in 3 Bingh. 279., supposing your Lordships can take notice of it, which I apprehend your Lordships cannot, framed as the record in this case is, in which the patron states himself to be prebendary of the prebend of South Grantham, anciently founded in the cathedral church of Sarum, and in right of that prebend the true and undoubted patron of the rectory of Welby in the county of Lincoln, in the diocese of Lincoln, I am not aware of any determination that so much need be stated, or that the common form which is to be found in 1 Burn. Eccl. Law, 150., would not be sufficient. That form runs thus: "I Sir W. P. B., true and undoubted patron of the rectory of the parish church of _____, in the county of _____, and in your diocese of _____, now vacant by the death of A. B. the last incumbent thereof," &c.; but though that form be necessary where the presentation is made by the prebendary himself, it does not follow that, because the administratrix cannot use that precise form, she cannot present at all. In the common case the executor or administrator cannot use the precise form used by the patron. It must of course be adapted to the particular situation of the party.

In considering the answer I shall give to your Lordships' question, I have confined myself to the matters contained in this record. Of the several documents stated in the judgment of the noble Lord, who was Chief Justice of the Court of Common Pleas when the case was determined in that Court, we have no judicial notice. They were not, they could not, have been given in evidence upon this record. Nothing decisive can be drawn from the general

history of the foundation of prebendal churches, or the appropriation of livings to them; there does not appear to have been any general mode of appropriation; they are stated to have been made to the body, or to some one particular member of it. Of what was the course pursued in the case before us we have no judicial notice, nor any evidence, either judicially or otherwise, respecting the will of the founder. Under these circumstances, therefore, in a case admitted to be of the first impression, and upon which no precise authority can be found, it seems to me that the safest course is to follow the general rule applicable to presentative benefices. My answer to your Lordships' question is, that the right of presentation belongs to the personal representative.

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Littledale J. concurred with the majority of the Judges; intimating, that he saw no reason for altering the opinion he gave in the court below.

Park J.—When the case out of which the question propounded by your Lordships for the opinion of his Majesty's Judges first came before the Court of Common Pleas, I took infinite pains by reading much in ecclesiastical history, by consulting our text writers (for as to decided cases there are none), and after that, after hearing two very elaborate arguments at the bar, and long consultations with the then Lord Chief Justice of the Common Pleas, I came to the conclusion that Mrs. Rennell, as administratrix of her deceased husband, was not entitled to that which she claimed; in giving which opinion I am happy to say I concurred with Lord Chief Justice Best (now one of your Lordships' house), and Mr. Justice Burrough, a man who for legal knowledge and sound and correct understanding was of no ordinary size. To err in judgment with two such judges, if err we did, can be no disgrace to any man. When this case was removed from the Common Pleas into the King's Bench by writ of error, three of the learned Judges of that Court reversed the judgment of the Court below against the opinion of Lord Tenterden the Chief Justice. So here again the

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Judges were three to one against the judgment; thus four Judges were opposed to four, and therefore we need not wonder that this case has found its way into your Lordships' house. I have again heard this case argued with great learning and ability at this bar. I have considered every argument, and studied the judgments of my differing learned brethren, and the authorities they have quoted; and though I do not deny that my mind has now and then fluctuated, which great learning and great ingenuity at the bar will frequently occasion, I have arrived at the same conclusion I did in the Common Pleas, namely, that the administratrix of Mr. Rennell is not entitled to the presentation to the church in question, the advowson of which belonged to Mr. Rennell as prebendary, in right of his prebend in the church of Salisbury, and that is the answer I propose to give to your Lordships' question.

Before I enter into the argument, which must be almost a repetition of what I formerly delivered, and which is now in print, I hope I may be allowed to assert, that had any thing passed either in the Court of King's Bench or in this House which had convinced my understanding that my former opinion was erroneous, I should be one of the first to acknowledge my mistake and to retract my judgment. I have done so on two other occasions in this House, and shall never be ashamed to make such an avowal, for none but a weak, nay a wicked mind will persist in error if the understanding and more matured reflection convince a person that he has before formed a wrong judgment.

It is admitted, that it is not necessary for your Lordships to decide, upon this record, who has the right of presentation to the living in question. The point is, whether Mrs. Rennell, as administratrix to her deceased husband (which must be in his *natural* capacity), has established her claim to a living the advowson of which belonged to her deceased husband *in right of his prebend* of South Grantham? Not that upon the general question I have not a clear opinion, for I do not think it goes to the crown, as it was surmised it did, but I think it goes to his successor in the stall or prebend in the church of Salisbury.

A point has been much insisted and argued upon, which seems to me to be the foundation of all the misconception in this case; but it is a point upon which there is no difference of opinion, namely, that in the case of lay patronage in the events which have happened, the patron dying after the actual vacancy, the personal representative, and not the heir, would have been entitled to the presentation, because, in merely lay patronage, the church having become vacant in the lifetime of the last possessor, it thereby became a chattel, went to the executor as personal property, being severed, and therefore no longer remained with the advowson as a part of the possessions of the heir of the person seised of the advowson; and in that case it is a mere question between the representatives of the same patron. Of this law there is now no doubt, grounded upon the authority of decisions and of a practice long known, although I own I cannot state or discover any reason very satisfactory to myself for deciding that the void turn in the lifetime of the patron is a mere chattel, when the question arises between the heir and the executor of a natural person. For Lord Coke, in his first Inst. 388. a. says, "that such a turn is "not assets," and therefore nothing can be made of it for the payment of debts: therefore the rule between heir and executor cannot depend upon considerations of that sort. But I agree with Lord Tenterden that the want of a satisfactory reason is not a sufficient ground for overturning a practice long established. This, however, in my way of considering this case, leaves the point still open; for I cannot find from any of my learned brethren in any Court who have judicially given any opinion, nor from any industry displayed at the bar in the Courts below, or in this House, nor from my own laborious reading and research upon this subject, that in any Court in England has such a case in specie ever been decided.

The question is, whether lay and spiritual patronage are not to be considered as standing upon a very different footing. That facts similar to those which have occurred in this case must have existed many hundred times, no man can doubt; and that ecclesiastical patrons thought it clear one

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way or other, must be the reason why no decision upon such a point is to be found in our books. I myself verily believe that till this claim was set up no spiritual person ever imagined that those rights which a man held *jure ecclesiæ* merely could be exercised by others after his death, the words of the grant to such a person being, “we duly
“and canonically invest *you* (not your executor, &c.) in
“and to the said prebend and canonry, and invest you
“with all and singular the rights, members, privileges,
“and appurtenances thereunto belonging;” otherwise one cannot but think that in 500 or 600 years such a claim would have been contested, and the point by some legal decision ascertained. No distinction can be more broadly drawn in the whole law of England than that between the lay and spiritual function and character; even the variety of cases and statutes quoted by my learned brothers, who have gone before me, and which I shall not fatigue the House by wading through, establish the distinction. Certain personal rights belong to one of these characters which do not belong to the other.

The transmission of church property also stands under very different considerations from the transmission of lay property. For instance, a person seised of a freehold right is said to *be seised in his demesne as of fee*: a clergyman, as in this declaration, is said to be seised in his demesne as of fee *in right of his prebend or canonry*. I cannot deny that many of the evils and absurdities, which I contemplate by giving effect to Mr. Rennell’s claim, will also arise in lay patronage; because it must be admitted, that by giving the presentation to the personal representative of a lay patron, it may fall to a very inferior person to present: but this evil arises out of the unfortunate situation in which lay patronage stands, but which, I contend, ought not to be carried one single point further, especially where the rule hardly applies, the lay patron acting in his *natural*, the other in a *politic* or *corporate* character.

What was the origin of lay patronage? I have looked much into it, and the result of all my researches is this, — that it arose in the infancy of society, and under these circumstances; — that though the appointment of fit persons to

officiate throughout a diocese was originally in the bishop, yet when lords of manors and other great men of old were willing to build churches, and to endow them with glebes and mansion-houses for the accommodation of fixed and resident ministers, the bishops, for the encouragement of such pious undertakings, were content that those munificent persons should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated. “Si quis ecclesiam cum assensu diocesani construxerit, ei jus patronatus acquiritur;” and hence have followed *all* the consequences to a mere lay possession or property: chattels, where chattels go to the executor; the rights of the heir to the heir, in cases where, by the common law, the rights of the heir were paramount to those of the personal representative. But still the question recurs, Do those rules apply to the spiritual patron, and can the rights and property which belong to his politic character be dealt with as if he were a private person? Of this there can be no doubt, that in our law, now, and, I hope, ever, lay and spiritual patronage will be upon a very different footing.

Bishop Gibson, in his Codex, p. 757., decisively makes this distinction. That very learned prelate says, — (and his authority upon subjects of this nature has always been considered as entitled to great respect,) — “The right or “property which the patron has in an advowson will not “warrant a plea, as it is in temporal property, (of course, “therefore, the bishop is contrasting it with an advowson “in spiritual hands,) that he is seised in *dominico suo ut “de feodo*, but only *de feodo*.” The reason of which is given by Lord Coke, Co. Lit. 17., because that inheritance (viz. an advowson) savoureth not *de domo*, and cannot serve for sustenance either of himself or his household, nor can any thing be received of the same for defraying of charges. And in the case of *London v. The Church of Southwell*, Hob. 304., where the words of the lease were, commodities, emoluments, profits, and advantages to the prebend belonging, it was adjudged that the advowson did not pass by the said words; because, said the Court, all

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the words used imply things gainful, which is contrary to the nature of an advowson regularly. Why is this so? I say it is so because an advowson in the hands of a sole corporator, a churchman, is not a matter of profit, but of naked trust merely; and the churchman, who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust, *in jure ecclesiæ*, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which, only as a member of the church, could he have a right to dispose. Mr. Rennell, therefore, had only a right as member of the church of Salisbury, and the moment he expired, all his rights as a member of that church ceased. Suppose, instead of his death, he had resigned his prebend in South Grantham, having omitted to fill up this living, could it have been for a moment alleged that he still had a right to it as *fruct fallen* during his holding the prebend.

Am I right in stating to your Lordships that this is a matter of trust only, for upon that much of the argument has turned? I wish to found myself again upon the authority of Bishop Gibson. On this point, in pp. 757, 758, founding himself on the authority of Lord Coke, he says, “even in cases of lay guardian in socage, the patron shall not present to an advowson, because he can *take nothing* for it, and by consequence he cannot account for it; and by the law he can meddle with nothing he cannot account for. Which said doctrine and the plain tendency thereof are exactly agreeable, not only to the nature of advowsons, which are merely a *trust* vested in the hands of the patrons, by consent of the bishop, *for the good of the church and of religion*, but also to the express letter of the canon law, the rule of which is, *jus patronatus cum sit spirituali annexum vendi vel emi non potest*.” In another place, the bishop says, “they are *mere trusts for the benefit of men’s souls*.”

If this be so in the origin of these things, even as to lay patronage, however the exercise of the right of selling advowsons and next presentations, when the churches are full, may have grown up, am I not right in stating to your Lordships that great difference exists between lay and

ecclesiastical patronage; and though it may now be impossible to shake the custom of making profit of advowsons in the hands of laymen, the other has always been considered as a mere trust, to be exercised by the patron for the benefit of the church, for the due discharge of which he alone is to look, which he alone is competent to consider with a view to the welfare and advantage of religion, in this respect committed to his sole care, and upon which his personal representative may be absolutely unable to form a judgment.

It may appear to your Lordships a low and unfit argument to state to this House, but when I gave my judgment in the Court below, I thought, and I think so still, that it is one of vital importance to the interests of that church, which every good man must love and revere, and to which I have never received a specious answer, except that the same inconvenience may occur in lay patronage, which I admit:—Suppose a prebendary dies insolvent as well as intestate, and that all his next of kin, as they probably would in such a case, renounced administration, and that his butcher, baker, or other inferior tradesman, being a creditor, took out administration: must such a person present? is such a person capable of forming a correct judgment of a person fit for the care of souls? and yet I defy the ingenuity of man to get out of the dilemma; for if Mrs. Rennell is to present, the butcher or baker must, under the circumstances supposed, have exactly the same right. I lament that the same consequences would follow in lay patronage, but I am quite sure, till compelled by the judgment of your Lordships' house, I cannot consistently with my feelings to your Lordships, nor to myself declaring a judicial opinion, advise that such lamentable consequences should be carried one step further.

That the presentation now under consideration is not assets of value is quite clear; it may be a chattel, but, in the hands of an ecclesiastic, a chattel of mere trust. It is admitted by every Judge and by every counsel that has spoken upon this subject, that there is a total silence of our law books during the whole period of our ascertained law of England, upon this precise point, although circumstances similar to

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the present must have existed many times; and this to me is strong convincing proof that till these days of novelty no such idea was ever entertained upon this question, and I verily believe that no man now living ever before heard of such a claim being advanced. The argument, I think, cannot be put in a stronger light than was done by my learned brother Burrough, when this case was before the Court of Common Pleas. The allegations of this declaration are, that the late prebendary in his lifetime and at his death was seised of the prebend or canonry founded in the church of Sarum, with its appurtenances, to which said prebend the advowson of the said rectory of the parish church of Welby belongs, in his demesne, as of fee, in right of the said prebend or canonry. By the law of England, a prebendary or canon is an ecclesiastical sole corporation. As such he can have no heir,—he can have no personal representative: as such, his prebendal rights or property cannot go either to his natural heir or to his personal representative. Where then must they go? to his successor. In their corporate capacities, in estimation of law, the predecessor and successor being one, it is a continuance of the same corporate body. A prebendary or canon is a corporator in two respects; in one respect, as a member of the corporation of dean and canons, he is one of the chapter, having *sedem in ecclesiâ et vocem in capitulo*; and he is a corporator sole, as prebendary. In every relation in which he stands to the church, he is a corporator.

I do not presume to state to your Lordships any thing particular respecting the constitution of this canonry of South Grantham, though much pains have been taken respecting it by Lord C. J. Best and Mr. J. Burrough in the Court below; because, though there be no doubt of the authenticity of the documents from whence their information was drawn, yet we are not judicially informed of the foundation of this particular prebend. When, therefore, in this declaration, the prebendary is said to be seised in his demesne as of fee in right of his canonry, it cannot be meant a seisin to him and his heirs; for, as a canon, he has no heir; it must therefore mean to him and his suc-

cessors. We find, in all our law books, the same law that I have above stated as to ecclesiastical sole corporations, from the highest to the lowest order of the church. Thus it is always said, the freehold is vested in the spiritual incumbent; but, if we could suppose it vested in him in his natural capacity on his death, it might descend to his heir, which cannot be; the law has, therefore, wisely ordained, that the spiritual person, as such, shall never die, any more than the king, by making him and his successors a corporation. By which means all rights are preserved entire to the successor: for the present incumbent of a spiritual charge and his predecessor, who lived centuries ago, are, in law, one and the same person; but if the personal representative, or even the natural heir were to intervene, the succession would be broken. 1 Black. Com. 470.

The position of Lord Tenterden agreeing with the majority of the Court of Common Pleas, though differing from his own more immediate brethren, has put this case in a strong and luminous point of view. "It is clear," says his Lordship, "that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented, and this will not be conformable to the general rights of an administrator, which are those only that belonged to the person or personal property of the intestate. She is the administratrix of the personal rights and property of the intestate; but I find no authority for saying that she is the administratrix of his politic rights or property also. If, in the case before the Court, it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will, in the particular instance, be exercised not merely by a person who has not the prebend, but by a person claiming, as if he from whom the title is derived, and who had the advowson in his politic capacity only, had in part held it in his natural capacity; a decision to this effect will be contrary to the nature of the right."

Some stress was laid in arguing this case upon the stat.

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of 21 Hen. 8. c. 11., and I own I was at first impressed with the argument arising upon it. But, upon considering the statute, and the motive for making it, it now appears to me to have no bearing upon the case. The statute was made at the dawn of the Reformation; and it appears that the then heads of the church, following in that respect the example of the see of Rome, exercised or endeavoured to keep in their hands the temporalities of the church, which belonged to them in their corporate character, whether aggregate or sole, an unreasonable time, for their private benefit, to the great ruin and impoverishment of persons appointed to livings: the statute deprived them of that right, and gave the benefit to the new incumbent from the death of the last, and to the executors of such new incumbents if he should happen to die before he realised those interests which the statute thus gave to him.

Much stress has also been laid, both at your Lordships' bar and at the bar of the Courts below, upon the options of the archbishops, which I admit are allowed to be the subject of devise, and may go to executors. But, I answer, they are anomalies in the law, and the exception proves the general rule. They were originally, Mr. Justice Blackstone thinks, derived from the legative power formerly annexed by the popes to the metropolitan of Canterbury, and that right has been continued to the archbishops in their respective provinces of Canterbury and York, even after the power of the popes had ceased in this country. But all these anomalies, I again repeat, support my general argument to shew that the rights of lay and ecclesiastical persons stand upon a totally different foundation, and that the law, attaching as it may upon property of this description in the hands of a lay person, does not attach upon the same species of property in the hands of one who holds *jure ecclesiæ*.

The case from 2 Wils. 150., *Repington v. The Governors of Tamworth School*, has been much pressed, but it is difficult to ascertain the grounds of that judgment; it was a case of a donative, and Lord Tenterden thinks that the decision may have proceeded on the ground that the Court thought the rule as to presentative benefices in lay hands

not well founded, and, therefore, not to be extended. A donative, however, is of a very peculiar nature; and, therefore, any decision respecting that may be considered as anomalous also. And, indeed, Mr. Justice Blackstone, speaking of donatives, considers them as exceptions; for he says, these exceptions to general rules and common right are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If, therefore, the patron (of a donative) in whom such peculiar right resides, does once give up that right, (by presenting his clerk to the bishop, and procuring institution and induction,) the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever, and will, therefore, reduce it to the standard of other ecclesiastical livings.

The ground of my opinion is, that this species of interest in the case of spiritual patrons, whether aggregate or sole, is a mere personal trust, to be exercised by him or them in the spiritual character which he cannot, consistently with his high duty if he be a sole corporator, either devolve upon another during his life, or at his death leave to be exercised by his heir or personal representative. He holds *jure ecclesiæ*, and in that right only; and if he had it not in that right, he could not have it at all; and when he dies, all his rights, powers, and privileges derived from the church absolutely cease, as if he had never existed. This is no new notion; for that laborious and learned writer upon ecclesiastical law, Dr. Burn, in his vol. ii. 7th edit. p. 92., tit. Deans and Chapters, — (Dr. Godolphin, having said that after the death of a prebendary the dean and chapter shall have the profits, but by the statute 28 H. 8. “the profits of a prebend during the vacation shall go to the successor,”) — reconciles this apparent contradiction thus, which bears on the discussion now before your Lordships: — “the issues of those possessions, which he has in common with the rest of the chapter, (that is, a corporation aggregate,) shall after his death be divided amongst the surviving members of the chapter; but the profits of those possessions, which he has in his separate capacity as a sole corporation of himself, shall be and enure to his successor.” Dr. Burn seems well

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supported in this distinction by the case of *Young v. Lynch*, Sayer Rep. 84.

Therefore, if a member of a chapter, which is an aggregate corporation, should die after a living had become vacant, it seems to me that his personal representative might as well contend for a voice in the chapter as to the filling it up, as that such representative might have it to himself exclusively, where a living belonged to him as a sole corporator merely; although Dr. Burn more justly says, that in one of the cases stated by him, it would go to the surviving members of the chapter; in the other to the successor. When Bishop Gibson says, “advowsons may be granted by deed or will,” &c. he is evidently speaking of lay patronage only, for he adds, “This general rule is to be understood with limitations, that it extends not to ecclesiastical persons of any kind or degree who are seised of advowsons in right of their churches; all these being restrained as to bishops by stat. 1 *Eliz.*, and next by 13 *Eliz.* from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and of that sort advowsons and next avoidances, which are incorporeal and lie in grant, cannot be.” This distinction between laity and clergy pervades every page of our ecclesiastical history, and those well versed in the history of our venerable church will immediately recognise the justice and accuracy of those principles which I have been endeavouring to establish.


It is well known that, in the early periods of the church history of this country, the *parochia* or parish was the episcopal district. The bishop and his clergy lived together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund for the support of the bishop and his college of presbyters and deacons, for the repair and ornament of the church, and for other works of piety and charity. At this time, and in the infancy of society, the stated ordinances of religion were performed only in these single choirs, to which the people of each whole diocese or *parochia* resorted, especially at the more solemn seasons of devotion. But, in order to supply the inconvenience of distance from the mother

church, the bishop was wont to send forth some of his clergy to preach and dispense the word and sacraments; and these missionaries returned to give the bishop a due account of their labours and success. As the wants of society for spiritual instruction increased, and when the members of the episcopal college found it inconvenient to go forth, certain churches were allotted, some by laymen, (where they had the patronage given them, as a compensation for having built and endowed churches, and hence the origin of lay patronage, as before shewn,) some by the bishops to the prebendal body at large, some to one particular member of the body, all which may be seen by those who will take the trouble of looking into the ancient records of the church. Thus, these churches which were not in lay hands, became prebendals, and the supply of the duty was left to the aggregate corporation where the perpetual advowson was in the whole community of the dean and chapter; or to that sole corporation or single canon or prebendary, who was to have his prebend or exhibition from it.

In process of time the representative curates, who were to account for their profits, and only to receive a small stipend for their services, were so ill paid, that the bishop obliged his clergy, who had such advowsons, to retain fit and able capellans, vicars, or curates (for these are all nearly of the same import), with a competent salary. This failing, the bishop again interfered, and obliged the clergy, (that is, the chapters, or the single prebendary, in whom the perpetual advowson in right of the chapter, or in right of his prebend, of which he was seised *jure ecclesiæ*, was vested,) to make the presentation to spiritual persons to be endowed and instituted, who should thenceforth have no more dependence upon their spiritual than others had upon their lay patrons, with a competent maintenance to be assigned by the bishop. Much of this information may be inferred from the statutes 15 *Rich. 2. c. 6.* and the 4 *Hen. 4. c. 12.* I have not thought it necessary, in giving this detail to your Lordships, to refer to authorities; but what I have advanced will be found as the early history of our church in various books well worthy the attention of the curious,

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such as Spelman *de non temerandis Ecclesiis*, Bishop Kennett on Impropriation, and Burn, tit. Appropriation. I have presumed to trouble your Lordships with this short history of the church, because it seems to me to prove incontrovertibly that what is thus vested in the church for spiritual purposes vests in them as a body politic, and can never be allowed to fall into the common private stock of the body at large, or of the individual sole corporator. And it will be found that what is said of the church at large is no less true of the church of Salisbury, as was luminously shewn by Lord Wynford and Mr. Justice Burrough in the court below.

Thus, then, an ecclesiastical person during his incumbency is entitled to all the profits that may fall of a chattel nature. But when a living falls vacant, to which he has a presentation in right of his church, as it is not a matter of profit, he merely presents *quasi* incumbent.

I have shewn to your Lordships, that the living in the present case was probably endowed out of the prebend, or the advowson attached to the prebend of South Grantham; in either case the prebendary, as a sole corporator for the time being, has the right of presentation; and upon the avoidance, he may present in right of his church; he presents as a trustee; the trust is personal, without profit, and cannot be transmitted.

How, then, can a private personal representative of a deceased prebendary, who dies after avoidance, but before presentation, claim the presentation? Is it that he makes it a *chose in action*, out of which to pay the debts of his testator or intestate? That cannot be, for it is not assets. Does he claim to present because this trust had devolved upon him, or, as it were, became vested in the testator or intestate? The trust has indeed devolved upon him, but not in his own right; but, as the declaration truly states, in right of his prebend: the presentation is in him, not for his own use or benefit, but for the use and benefit of the church, confided to his spiritual, not to lay hands, for the dignity and ornament of the church, — a trust which he, and he only, must execute upon his great personal responsibility, for the cure of souls, and for the advancement

of the interests of religion, — a duty which his personal representative in his natural capacity cannot, in law, be deemed qualified to discharge.

I fear I have fatigued your Lordships with the length of the argument; but as some of my brethren unfortunately differ from me, I could not satisfy my conscience upon this great, and, as I think, awfully momentous question, without satisfying your Lordships that I have not come to the conclusion which I have stated without most anxious consideration and deep research. The result then of my opinion is this, that whatever is attached to a spiritual, sole, politic body, sinks with the death or resignation of the party who possesses that right.

Bayley B. — As the opinion I delivered when this case was before the Court of King's Bench is in print, and as I see no reason to vary from any of the grounds upon which that opinion was founded, I shall not be obliged to detain your Lordships at any considerable length. I take the general rule, with the single exception of benefices in the gift of bishops, to be, that when a benefice becomes vacant, the right to present is immediately detached from the estate which gives that right; it vests as a mere personal power of presenting in the individual who had the right of patronage at the time that vacancy occurred, and will continue in him and his personal representatives, let what will become of the estate which gave such right. Therefore, if the right to present to an advowson appendant, or an advowson in gross, when a vacancy occurs, be in tenant in fee or tenant in tail, and he die without presenting, though the estate will pass to his heir or devisee in the one case, and to the issue in tail or remainder-man in the other, the right to present will devolve upon his executor or administrator. F. N. B. 33. P. 34. B. Co. Litt. 388. Dy. 283 a. 21 Hen. 7. pl. 6. Bro. *Present. à l'Eglise*, 34. If the right to present when a vacancy occurs be in tenant *pur autre vie*, or in a *termor*, and before he present *cestuique vie* dies, or the term expires, so that the estate which gave him the right to present is gone, that right nevertheless remains in him, and he may still present. F. N. B. 34 B. Bro. *Pres.*

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à l'Eglise, 22. Again, if husband and wife be seised in fee or in tail, or in right of dower, in right of the wife, and the church become void, and the wife die before the husband present, though the fee descends upon her heir, or the estate tail passes to the heir in tail, or the estate in dower ceases, the right to present remains in the husband. 21 *Hen.* 6. B. 38 *Hen.* 6. 36. B. 14 *Hen.* 4. 12. Bro. *Præ. à l'Eglise*, pl. 22. Co. Litt. 120. And if a vicarage become vacant, and the person to whom the right of presenting belong be made bankrupt (whereby his right in the patronage ceases), he shall nevertheless present. F. N. B. 34 N. So, had Mr. Rennell been presented to a bishopric, would he have lost the right? The general rule, however, is not disputed; but its application to the present case is denied, and the ground of that denial is, first, because Mr. Rennell was a spiritual corporation, and had this right of presentation annexed to a spiritual dignity, and clothed with a spiritual trust. My answer is, that though Mr. Rennell was a spiritual person, the dignity to which the right of presentation was attached, was not in its creation spiritual; and, that if it were, it was not clothed with any spiritual trust. Mr. Rennell's dignity was a prebend only; and at common law a *layman* might be *prebendary*. *Bland v. Maddox*, Cro. Eliz. 79. A prebendary has no cure of souls; he is called "prebendary," because his duty is *prebere auxilium episcopo*. He has his possessions annexed to his prebend to enable him to provide for himself and his family. It is only by the restraining statutes that he is prevented from alienating, with consent of patron and ordinary, all his possessions to the disherison of his successor; and he has of himself the full power of alienating them, so as to bind himself; and it is not of necessity that he should have any possessions. 3 Rep. 75 b. Dy. 61 b. pl. 30. 50 Ed. 3. 26. 2 Roll. Ab. 341. It is only under 13 & 14 Car. 2. c. 4. s. 14. that he need be in holy orders.

But admitting that a prebend were a spiritual dignity, does it follow that church preferment in the gift of the prebendary in right of his prebend, is clothed with a spiritual trust? Is the spiritual preferment to which a bishop is entitled in right of his see, clothed with any spiritual trust.

May he not grant away the next avoidance of any church, though the advowson be in gross, which he as bishop is entitled to fill, or as many avoidances as shall happen within his own time? and will not such grant bind himself? Watson says he may make the grant, and it will bind him. Watson, c. 10. p. 135, 136. c. 45. p. 873. If an advowson be appendant to a manor usually let, and a lease be made thereof, it will, at all events, bind the bishop who made it, and his lessee shall present. Gibson, 793. says, "Advowsons may be granted by deed or will, either
 "for the inheritance, or one or more turns. But this ex-
 "tends not to ecclesiastical persons seised in right of their
 "churches, nor to colleges or hospitals seised in right of
 "their charter; for they are so far restrained by the
 "statutes of Eliz., that their grants, though confirmed,
 "will not bind their successors. But they will bind the
 "grantors for their own time." And if it be made conformably to the statutes, it will bind the successors. Watson, c. 10. p. 137., c. 45. p. 875, 876. In *Smallwood v. The Bishop of Coventry*, Cro. Eliz. 207., the bishop had made a grant of the next avoidance of an archdeaconry, (a spiritual dignity,) and he afterwards disturbed the grantee; the grantee died, and his executor brought a *quare impedit*, and the bishop's grant was held good, and the executors had judgment. In *Foord's case*, 1 Anderson, 47. 5 Rep. 81. Dyer, 338 b. Cro. Eliz. 447—472., a prebendary of this very church made a lease of a rectory, parcel of his prebend, for seventy years. The dean and chapter confirmed it for fifty-one years. The successor disputed it within fifty-one years. Watson says, it would have been good for his own time without confirmation; Watson, 481.; and all the Court (except Griffin) held it good for fifty-one years. In *London v. Chapter of Southwell*, Hob. 303. where Plaintiff claimed in *quare impedit* as lessee of a prebend to which the advowson belonged, the question was, whether the lease had words sufficient to carry the prebend or not; and it was only because the words were not sufficient, that the decision was against the Plaintiff. Presentations to a vicarage belong of common right to the parson; but by consent of patron and ordi-

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nary he may grant it to another: F. N. B. 34. *a*. The case of *Sharrock v. Boucher*, T. Raym. 88. 1 Lev. 125., seems to shew the distinction between what is clothed with a spiritual trust, and what is not; and what may be alienated, and what cannot. A prebendary leased his prebend for three lives, and whether that passed the right to fill up the office of commissary within the prebend was the question; the judges agreed it did not, if the right belonged to his spiritual functions; but on that point they were divided.

The only remaining point is founded upon the rule which prevails in the case of the king and a bishop, and a supposed analogy between that case and this. When a bishop dies, leaving a church in his gift vacant, the king is to present, not the executors of the bishop. And if this rule be founded upon the spiritual character of the act of presenting, it is an authority in this case; if it be founded on the relation between the bishop and the king, and is referred to the king's prerogative, it is not. And I am of opinion it is referable to the relation between the bishop and the king, and to the king's prerogative. The king is the sovereign patron of every bishopric: 17 Ed. 3. 40. And though he gives the chapter leave to elect, the patronage is in him: 17 Ed. 3. 40. And upon the death of a bishop, the see comes to the king as the bishop left it; and if the deanery or a stall be left vacant, the king shall fill it up: 17 Ed. 3. 40. A prebendary of Abergavilly, the bishop (of St. David's) died. The temporalities were seised into the king's hands; a new bishop was appointed, and filled up the stall. The king brought *quare impedit*, and it was adjudged that he had the right; and a writ was awarded to the bishop: *Rex v. Bishop of St. David's*, 50 Ed. 3. 26. The temporalities came to the king as founder by prescription: Mall. 65. n. to pl. 1. And this is so high a prerogative, and so far united to and inseparable from the crown, that a subject cannot claim it by grant or prescription: Mall. 65. n. to pl. 6. And if the king die, *sede vacante*, the succeeding king shall have the temporalities, not the king's executor: Mall. 65. n. to pl. 4. Bro. Chattels, 2. 2 Roll. Abr. 211. And if the king die, leaving a church void, the succeeding king shall present: Semb. Mall. 65. pl. 4. and Mall. 42. pl. 16. Bro. Chat-

tels, 2. 2 Roll. Abr. 211. And this, though the church became void in the bishop's life, and though the new bishop has sued out livery out of the king's hands before the king presents: Mall. 65. pl. 5. Watson, 73. F. N. B. 33. n. 2. Roll. Abr. 343. pl. 5. In the case of a bishopric, therefore, if the bishop dies, whatever spiritual preferment in the gift of the bishop was vacant at the bishop's death, and whatever shall become vacant till the see is filled up, devolves upon the crown, and is inseparable from the crown, so that the crown cannot grant it away; and in case of the demise of the crown, it will pass, not to the executors of the deceased king, but will accompany the crown, and go to the succeeding king.

Upon this, two observations occur, one, that in the case of the crown only can a sole corporator, which the king is, take a chattel by succession; so that, what is the rule in the king's case where the right to present may, by reason of the prerogative, pass from bishop to king, from king to king, will not apply to the case of a prebendary where there is no such prerogative, to pass the right from prebendary to prebendary: 16 Vin. Q. 14. 17 Vin. Y. The other, that what is the case of the crown with reference to a bishop who holds *per baroniam*, is the case with every other tenant *in capite*, where the tenancy, by reason of infancy in the heir, becomes as it were suspended, and the tenancy returns in wardship to the king. Co. Lit. 388. a. is express upon this point, and he puts the two cases together, that of the king's tenant *in capite*, and that of a bishop's. If the king's tenant by knight's service *in capite* be seised of a manor to which an advowson is appendant, and the church become void and the tenant die, (leaving his heir in ward,) the king shall present, not the executor. And if a church, in the gift of a bishop, become void, and the bishop die, the king shall present, not the executor: Co. Lit. 388. a. The right, therefore, of the king, in the case of a bishopric, appears to me to be referable, not to the spiritual character of the person from whom the right comes, but to the king's prerogative, because it obtains equally in the case of every tenant *in capite*, whether he be a spiritual person or not.

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Upon the whole, therefore, I am of opinion that the general rule is, that if a church becomes vacant, and the patron die, the right to present devolves upon his executor: that this is the rule also, where a prebendary in right of his church is patron, because, until the statute of Car. 2. (13 & 14 Car. 2. c. 4. s. 14.) it was not necessary a prebendary should be a spiritual person; and, because, in the case of spiritual persons, their right to present to churches is temporal, not spiritual, inasmuch as they may grant it away before a vacancy occurs, as they may their other temporal possessions; and that the excepted case of a bishop is not applicable to other spiritual persons seised of advowsons in right of their dignities or churches, because the case of a bishop is referred to the prerogative of the crown, which enables the crown to take a chattel in succession, and to the relation in which the crown stands to a bishop, the bishop being tenant *in capite* to the crown, not to the spiritual character of the bishop, nor to any spiritual nature in the right. My answer, therefore, to the question proposed by your Lordships is, that in the case that question propounds, the right of presenting belongs to the executor of the prebendary.

Tindal C. J. — My Lords, upon the best consideration I can bring to this case, I have come to the conclusion, that the right of presentation belongs to the personal representative of the late prebendary; but at the same time I am ready to admit it is after considerable doubt upon the question which has been submitted to us by your Lordships.

If I felt myself at liberty to look at the particular foundation of this prebendal stall, or to consider upon general principles, what might be most fitting and expedient in the case of patronage belonging to an ecclesiastical corporation, such as is a prebendary, I could bring myself without difficulty to the conclusion that the right to fill up the turn which was vacant at the time of the late prebendary's death, ought to devolve upon his successor, and not to go to his personal representative.

But neither upon the abstract question proposed by

your Lordships, nor upon the facts stated on the record in this case, can I take judicial notice, either of the circumstances attending the original foundation of this prebend, the endowment thereof with this particular advowson, or the form of presentation which has been used and adopted on occasion of former vacancies.

And as to any considerations derived from general expedience, I feel myself restrained from entering into them, because there appears to me to be an analogy of sufficient strength and certainty, to bring the present case within the reach of acknowledged principles of law, and the authority of various decided cases.

It is upon the ground of this analogy which exists between the present case and those principles and authorities, that I feel myself bound to concur in the opinion which has been expressed by the majority of his Majesty's Judges: thinking it a safer course upon this occasion, as I find has been the opinion of other Judges, from the earliest periods of the law, to adhere to any rule which can be safely inferred from the cases, rather than to substitute another, although it may appear upon general principles more reasonable and more just.

I assume it to be settled law, admitting of no doubt or dispute, and not requiring to be supported by reference to any authorities, that where an advowson presentative is vested in any person in his natural capacity, either in fee or for life, and the church becomes void, and the owner dies after such avoidance without making any appointment, the right to appoint to the vacant turn belongs to the executor, and not to the heir, or to the next owner of the advowson. Indeed, so clearly is this principle recognized, that all the books concur in calling this vacant turn a chattel vested in the testator. (Fitz. N. B. 33 P. 34 N. 4 Leon. 109.)

In the case in Fitz. N. B. 33 P. it is stated, that if a man be seised of an advowson in fee, in gross, or in fee appendant unto a manor, and the advowson becomes void, and he dieth, his executor shall present, and not his heir, because it was a *chattel vested* and *severed from the manor*. If the chattel is severed from the manor in that case, why may it

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not be considered as severed from the prebend in this? And if once severed, it is difficult to assign any legal principle upon which it can be remitted. Unless, therefore, some solid ground can be laid down, upon which a distinction can be made between a prebendary seised of the advowson in right of his prebend, and a person seised in his own natural right of a manor to which an advowson is appendant, there can be no doubt but the case falls within the general rule, that the right to present is a chattel interest, and would go to his personal representative. It will be advisable, therefore, to refer to some of the cases and principles which carry the analogy more closely to the particular question now under discussion.

In Fitz. N. B. 34 N. is found this case; if a vicarage happen void, and *before* the *parson* present he is made a bishop, &c., yet he shall present unto this vicarage, because it is a chattel vested in him. The authority referred to is 24 Edw. 3. 26.; but the case, which is not to be found in the Year Book, will be found inserted nearly in the same words in Fitz. Abr. Quare Imp. 22. In that case, as in the present, the patron was seised *in jure ecclesiæ*: and notwithstanding he ceased to be rector, he still carried with him in his natural capacity this chattel interest, the right of appointing to the vacancy. In that case it was held that the chattel interest which had once vested in him, did not afterwards reunite with the corporation sole, the parson. That case appears to me to be a direct authority upon the present question, to this extent; that if the living had become void, and the prebendary had vacated the prebend, the right of appointment would have belonged to him, not to his successor. If so, and he still retained the right to appoint, notwithstanding his loss of the prebend, on what principle shall his death be held to reunite the presentation with the prebend, from which it has once been severed? The case in 2 Rol. Abr. 346. F. pl. 4. shews the law, where the avoidance of a vicarage happens after the vacancy of the rectory, and before the new rector is appointed. “If the parson has the right to present to the vicarage, yet if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage shall present.”

So that although the rector be in the nature of an ecclesiastical corporation sole, and although the rector be seised of this right of presentation *jure ecclesiæ*, yet it shall not devolve to the successor; but if it happen *before* the vacancy, the former rector shall still appoint; if *during* the vacancy, the patron. Both which cases are strong to shew, there is no indissoluble union between the right of presentation and the prebend itself.

To which may be added the case stated in Fitz. N. B. 33 P. “that if a bishop die seised of a manor to which an advowson is appendant, and the advowson happen void before his death, the king shall present unto the same by reason of the temporalities, *and not the bishop’s executor.*” The reason is that the king takes the temporalities by reason of his prerogative, and the turn being once vested in him, cannot be got out of him but by matter of record. Now although the express point adjudged by that case does not apply here, because there is no prerogative in this case, yet it furnishes an observation which appears not unimportant. Fitzherbert puts this case in opposition with that which had immediately preceded it, namely, the case in which he has stated “the executor shall present and not the heir, because it was a chattel vested and severed from the manor, &c.” He then puts the case of the bishop; and the inference to be drawn is, that but for the prerogative the executor would have presented: otherwise he would not have said, the king shall present, *and not the bishop’s executor*; the observation would have been, the king shall present, and not the successor.

If this is a just inference, the authority of the case last referred to would go the length of deciding the present; if the executor of the bishop would be entitled to present to the turn which fell vacant in the bishop’s life, and which belonged to the bishop, *jure ecclesiæ*, had not the prerogative stepped in and prevented him; it would follow in the present case, where no such prerogative exists, the executor has the right to present to the vacant benefice.

The power of the prebendary to grant the next turn to a stranger before it becomes vacant, affords a further argu-

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ment against the notion that the right of presentation is to be considered as inseparably annexed to the prebendary himself for the time being, on the ground that it is an ecclesiastical trust, to be exercised by him only to whom the foundation has given it. Such grants are of very frequent recurrence in the old books of entries containing pleadings in *quare impedit*; and it is not to be conceived that they should be found there unless the practice was common, nor that they could have been put upon the record if such grants were against law; inasmuch as the Plaintiff deriving title under them would only be shewing the insufficiency of his right to sue.

Again, the universal practice of grants made to the archbishops by bishops of their province, of those rights of presentation well known by the name of options, furnish at least the inference, that though the right to present comes to an ecclesiastical person, by virtue of his ecclesiastical character, still there is no rule of law that it must be exercised in person, but that the law allows it to be transferred to another. It may indeed be said, that this is not a transfer to a layman or a stranger, but merely to an ecclesiastic of the same or higher dignity; and therefore this ecclesiastical trust may be presumed not to be violated by such transfer of its execution. Admit it to be so, still how can we reconcile to that principle the right which the archbishop has to devise these options to any one he chuses to select? And that such power exists, appears from the case of *Potter v. Chapman*, Ambl. Rep. 98, where the only question before Lord Hardwicke is made upon the propriety of the particular appointment by the trustees under the archbishop's will, but none whatever upon the right of the testator to bequeath them to his trustees. If then the bishop may sever and disannex from his bishoprick a right of presentation to which he becomes entitled *jure episcopatus*, and no otherwise; still further, if the archbishop to whom the grant hath been made may bequeath it to a stranger by his will; or, what is an identical proposition, if it would devolve upon his personal representative in case he had made no such bequest; it will surely be dangerous to build an opinion that the present-

ation now in dispute must belong to the successor, on the ground that it is of an ecclesiastical character, in the nature of an ecclesiastical trust, and by reason thereof must be exercised by the person who fills the prebendal stall, and by him only. So that the doctrine laid down in Doctor and Student would appear to be correct, where no distinction whatever is introduced between presentations made by laymen or presentations made by corporations; between advowsons appendant to manors, or advowsons appendant to offices of the church; but it is laid down generally thus, (see Dial. 2. cap. 26.) — “It is holden in the law of the “realm, that the right of presentment to a church is a “temporal inheritance, and shall descend by course of inheritance from heir to heir, as lands and tenements shall, “and shall be taken as assets, as lands and tenements be.” And again, “the goods of spiritual men be temporal, in “what manner soever they come to them, and must be “ordered after the temporal law, as the goods of temporal “men must be.” Now if the vacant turn in a benefice be a chattel interest, as the authorities above referred to seem abundantly to shew, if it passes by grant, is devisable by will, or, in case of no bequest, goes to the personal representative; then indeed is the passage above cited a strong proof of the opinion of learned men at the early period when that book was written, that no just distinction can be taken between a right of presentation vesting in a spiritual man, by whatever means it may come, and a similar right in a layman.

It affords a further argument that the right to present to the vacant living cannot devolve upon the successor, and go along with the prebend, that a prebendary is a corporation sole, and that by law a corporation sole is incapable, except by custom, of taking in succession chattels real or personal, either in possession or action. (Co. Litt. 9. a. 46 b. Hob. 64.) If this be the law, how can this vacant turn, once severed from the prebend, become reunited, and descend with the corporation sole?

That such would not be the case as to some of the profits of the prebendal stall, where they fall due in the lifetime of the predecessor, appears clear. Rent which accrued

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due in his lifetime would go to his executor. For the statute 28 Hen. 8. c. 11. gives to the successor the rent *only* which accrues *during the vacancy*; leaving the right to the rent due in the predecessor's lifetime where it then stood, that is, as a *chose in action* or a personal chattel, which would go to the personal representative. But it is very difficult to draw a sound distinction between rent which has fallen due, and a right of presentation which has attached during the life of the former prebendary, except upon the ground that the one is a right of a temporal nature, the other of a spiritual; and whether that be a sound distinction or not, I must lean upon the names and authorities which I have before given.

The case of the donative, cited from 2 Wils. Rep. does indeed furnish some inference for a different opinion from that which I have formed; but I must confess myself unable to see the ground upon which that judgment proceeded in so short and unsatisfactory a report, with such degree of clearness as to place it in competition against the other principles to which I have referred, and which lead my mind to a different conclusion.

I have therefore felt myself bound, by the analogy to be drawn from cases decided as to lay advowsons, to adopt the opinion, that the right of presentation in this case belongs to the administratrix of the late prebendary. I must admit, at the same time, that it might be more fitting and expedient that it should devolve upon the successor; but I am not asked by your Lordships what is most expedient, but what the law at present is upon the question submitted to us.

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Lord Lyndhurst. — This was a writ of error from the Court of King's Bench, reversing a judgment in a case of *quare impedit* pronounced by the Court of Common Pleas. When the case came before the House of Lords, it was argued with great ability in the presence of the Judges; and questions having been put to them by the House, which they took time to consider, there was a difference

of opinion among them. Six concurred in opinion that the judgment ought to be affirmed. Two were of a contrary opinion.

I propose now to move that the judgment of the Court of King's Bench should be affirmed, not upon the ground that a majority of the judges were in favour of that judgment, but because it appears to be the more sound and correct opinion. After the ample discussion which this case has undergone, and the accurate investigation of every authority upon the subject, it is not necessary to enter into a detailed consideration of the question.

I will state shortly the grounds upon which it appears to me that the judgment of the King's Bench ought to be affirmed.

The material facts are these :—Mr. Rennell was a prebendary of Salisbury cathedral. To his prebend was annexed the rectory, or the advowson of the rectory, of the parish church of Welby in Lincolnshire. The incumbent died while Mr. Rennell was prebendary, and Mr. Rennell died before he had appointed a successor. The question is, whether the right to present to the vacant church belongs to the representatives of Mr. Rennell or to his successor in the prebend.

An advowson is the right of presenting to a benefice. It is an incorporeal hereditament attended with all the usual incidents of that species of property. It may be conveyed in fee, granted in tail, or for term of life or years, or for the next presentation. All these partial interests are carved out of the fee. While the church is full, the right of presentation is annexed to the advowson, and passes with it into the hands of the party who becomes intitled by descent or devise, or otherwise.

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A grant of the advowson carries with it the right to the next presentation, if the church is full. If the church is vacant at the date of the grant, the right of presentation takes a new direction. From the time of the vacancy it becomes a chattel—a personal chattel, which vests in the personal representative, a chose in action—fruit severed from the advowson like arrears of rent. In such case the next presentation, according to all the authorities, passes, not to the heir, but to the personal representative of the party dying seised of the advowson. So, if the advowson is granted for a term, and the church becomes vacant, the lessee has the right to present, upon the ground that the right of presentation is severed from the advowson. Upon the same ground, where a married woman is entitled to an advowson and dies, the right of presentation is in the husband.

As to the principle of the decisions, there is no doubt. But it has been argued here, as in the court below, that in reality there is no severance. The authorities and cases cited in support of this doctrine constitute merely exceptions to the general rule, and in effect tend to establish the rule. Of this description is the case of a tenant *in capite* of the crown, holding a manor to which an advowson was annexed; and after the church became vacant the tenant died, his heir being within age, in which event it was held that the right of presentation fell to the crown, and did not belong to the personal representative of the tenant. That case forms an exception to the general rule, which is founded on the prerogative of the crown; and it is to be inferred from the argument and the judgment, that if it had been the case of a private per-

son, the right of presentation would have devolved on the personal representative, and not upon the heir. That the rule in this case depends upon the law of prerogative, appears also from this consideration—that if the tenant comes of age, and sues out his *liberate* before the king has presented, the tenant retains the right to present, which shews that there was a severance. In like manner, when a party entitled to an advowson grants it during a vacancy, the right of presentation does not pass, because it is severed before the grant.

Another case cited is, where a bishop being entitled to an advowson in right of his bishopric, and the church becoming vacant, the bishop dies before presentation. In which event the crown has the right to present, and not the representative of the bishop. This, on the same principle, must be considered as an exception to the general rule, as depending upon the law of prerogative. Another case within the same principle is where the incumbent himself is the patron, upon his death the next presentation was adjudged to belong to the heir; because, the rights being contemporaneous, the title of the heir is more favoured in law, and held to be superior.

These were the cases produced in argument to combat the general position of law that, upon a vacancy of the church, the right of presentation is severed from the advowson. But they are exceptions, and the principle is clearly made out in the case of a natural person.

The next question is, how the rule is applicable in the case of a sole corporation. To consider the question first as disincumbered of its ecclesiastical

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character. Between a sole lay corporation and an individual there is no difference as to the course of succession : real estate would pass to the heir or successor ; personal estate would pass to the personal representative. Arrears of rent, relief fruits fallen from the inheritance, and severed from the reality, pass to the personal representative. That a chattel interest cannot pass to a successor appears by Fulwood's case.* The presentation, therefore, in this case, if it is severed and has become a chattel interest, cannot devolve to the successor. The rule is as clear, in point of law, with respect to a corporation sole as to a natural person.

Then arises the question how it will apply to a prebend. Now a prebendary, as such, has no cure of souls. Before the statute of uniformity it was not even necessary that he should be an ecclesiastic. No alteration was made by that statute as to prebends, except that the office must be exercised by an ecclesiastic. It would be singular if the law were to vary according as the person were lay or ecclesiastic. Nor does it follow, because the prebendary is ecclesiastic, that the presentation must pass to the successor upon his death. In the case of op-tions it has been held that they do not pass to the successors, but to the personal representatives of an archbishop. So, in some cases of vicarages and other ecclesiastical rights, it has been held that they do not pass to the successor but to the personal representative. These cases furnish a strong argument to show that immediate ecclesiastical patronage may by law be vested in persons not ecclesiastical, and that the act of uniformity requiring certain

* Co. Rep.

offices to be filled by ecclesiastics has not affected the rule, that when the church is vacant, the next presentation is severed from the inheritance, and passes to the personal representative, in the case of an ecclesiastical as well as a lay patron.

But it is argued that great inconvenience might ensue from this law ; that the presentation to ecclesiastical offices might fall into the hands of creditors, or women, or tradesmen. But that is the case according to the existing law, and to a great extent as to ecclesiastical appointments ; why should this case be an exception ? There is no practical inconvenience ; and if it were so to any extent, the judgment of the House in this case cannot with propriety be biassed by such consideration. If the law is inconvenient, it must be altered by the legislature.

Upon these grounds I submit my opinion to the House, that the judgment of the King's Bench ought to be affirmed.

Lord Wynford.— It has been said that the decision of this case should not stand upon the opinion and authority of the majority of the judges, but upon the law. I also wish to put it upon the authority of the law. But whatever my private opinion may be, I should wish, on the principle and rule laid down by Lord *Eldon*, that as the best security for the certainty and stability of law, there should be a concurrence of opinion, as far as possible, in all decisions. In this case the Court of Common Pleas held that the presentation was in the successor, one of the judges of that Court dissenting from the majority. In the King's Bench, Lord *Tenterden* was of the same opinion with the

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majority of the judges of the Common Pleas; but the three *puisne* judges of the court of King's Bench were of a different opinion, and the judgment of the Common Pleas was reversed. I have, since the hearing of this case, had an interview with the noble lord, the Chief Justice of the King's Bench; he retains the same opinion, which he has desired me to express. The argument, as I have understood it, has not grappled with the question. In the case of donatives the presentation goes to the heir; and, according to the authority of *Selden*, all livings in the kingdom were originally donatives. At that time no such rule could have prevailed.

In my opinion there is a difference between lay and ecclesiastical patronage. As Lord *Kenyon* has said, in lay patronage there is a trust coupled with an interest, and, therefore, when a living is vacant, it becomes a personal chattel. In that case it might happen that a Jew creditor might have the right of presentation. That is certainly an inconvenience. But ecclesiastical patronage is a pure trust. As Pope Clement said, the presentation to the church should be *quasi instante Deo*, as though it were in the presence of God. In this respect it differs from lay patronage, and the distinction has been recognised and acted upon lately, it having been adjudged upon writ of error in this House that resignation upon a bond in favour of a particular person was void. That was considered inconvenient, and an act of parliament was introduced to prevent the inconvenience. The act provides that such a bond shall be held valid in the cases of a child, &c. But that applies only to cases of lay patronage; and it is expressly provided that the powers of the act shall not apply to ecclesiastical patronage, upon

the obvious principle that ecclesiastical patrons have no interest. This is founded upon a distinction which I took in the Court of Common Pleas.

It is necessary to consider the origin of these benefices, and to ask what was the intent of the founders. Could they ever have intended their gifts to operate to the prejudice of the church? We should look to the history of the church of Salisbury, not to the rights of corporations sole. A gift from a donor to the clergy of a cathedral church could not be intended to pass into lay hands. The question of law as to corporations sole could never have been contemplated. The representative of the deceased prebend cannot be administratrix to the church of Salisbury. In lay patronage it is otherwise. In ecclesiastical patronage there is no connection of the representative with the person to whom the patronage belonged; for it belonged to the prebendary in his ecclesiastical character. This depends upon the canon law. As Lord *Coke* says, 344. a., “The ecclesiastical laws are allowed by the laws of this realm, which are not against the common law, nor against the statutes and customs of the realm.” So it is said “*Si beneficiatus decedat intestatus, ecclesia ei succedat.*” That is the very case under consideration. An ecclesiastic did depart this life beneficed. This is more distinctly explained in another passage. If no case to the contrary at common law is cited, the canon law must prevail. If there is no law upon the subject, common sense and convenience, and the interest of the church, should prevail, unless our hands are tied up. Would it be wise to leave the right of presentation to a personal representative, who might be a mere creditor? If so, the worst

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consequences might ensue. Not so, if the presentation goes to the successor. The church would take care of the fitness of the appointment. As to the argument from the case of options, it was a bad practice introduced by the pope.

There are some cases in the Courts of Equity where options have been recognized as the subjects of limitations in trust. These decisions proceeded upon the assumption that options were disposable at law as property. But the first case to be found of the assignment to an archbishop of a particular benefice, is that of Archbishop *Cranmer*. The legality of the practice may be doubted. If it had been the common law, it must have existed before the reign of Hen. 8.

I trust that this question will be settled by an act of parliament; and in this hope, although I do not concur in the opinions of the majority of the Judges, I will not oppose the motion for the affirmance of the judgment.

Judgment affirmed.

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(COURT OF CHANCERY.)

JOHN JOSEPH DILLON, Esq. - *Appellant.*SIR WILLIAM PARKER, Bart. - *Respondent.*

A party claiming under an instrument, raising, as he contends, a case of election in equity against a party in possession under a legal right, must make out a clear and satisfactory case to entitle him to displace the legal right.

Where, under the will of a son, giving benefits to his father, but of doubtful construction, there was no evidence that the father understood that a case of election was raised by the will, or that in fact he elected to take under it, and to give up estates disposed of by the will, to which he was entitled under a marriage settlement; and where it was in evidence that the father did acts in opposition to the will of the son; and where, by his own will, he so disposed of the estates, that his daughters might either claim life estates under that will, or estates in fee under the will of the son; and it was in evidence that they by letters declared and executed deeds, reciting that they took as tenants for life under the will of their father; and especially where the equity, if any, arose forty-three years before the suit, and the daughters had then the opportunity to call on the father to elect and failed to do so: Held, that it was doubtful whether a case of election existed, and that a party claiming under the daughters as heir could not assert such right after such lapse of time in a court of equity.

Where possession is referrible to either of two inconsistent rights, the acts of a party bound to elect, in order to constitute election, must imply a knowledge of the rights, and an intention to elect.

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THE question in this appeal arose in a suit in the High Court of Chancery in England. The case of the Appellant, who was Plaintiff in the suit, appearing by his bill and in his printed case, was as follows : —

Sir Henry John Parker, baronet, in the year 1741, intermarried with Catherine Page. He was at that time a widower, and had two daughters, Margaret Parker and Ann Parker, by his first marriage.

At the time of his second marriage, he was, among other things, seised in fee simple of the manor of Talton*, with the mansion-house and land thereto belonging, and of a freehold house* in Salisbury Court, in the city of London; he was also entitled to certain premises* in the parish of Tredington, in the county of Worcester, held under a lease granted by the Lord Bishop of Worcester to him his heirs and assigns, for the lives of three persons. He was also entitled to a leasehold estate, held under the crown for a term of years, consisting of the manor of Hampton in Arden, in the county of Warwick, the site of the said manor, and the houses, farms, lands, and premises belonging thereto.

By indentures of lease and release, bearing date the 1st and 2d days of October 1741, Sir Henry John Parker granted, &c. to trustees, all that messuage in Salisbury Court; and also all that manor, &c. of Talton; and also all those six grounds, &c. in Tredington; to hold, &c. after the marriage, to the use of Sir Henry John Parker and his assigns, for his life, with remainder to trustees, to preserve

* These were the estates in question in the suit.

contingent remainders ; with remainder to the use of Catherine Page for life, and after the decease of Sir Henry John Parker and Catherine Page, with remainder to the first and other sons of Sir Henry John Parker, on the body of Catherine Page, to be begotten in tail male ; or in default of such issue, to the use of Sir Henry John Parker, his heirs and assigns.

By another indenture of assignment and settlement, dated the 2d of October 1741, Sir Henry John Parker assigned the above-mentioned leasehold estate, at Hampton in Arden, to trustees, upon trust, after the solemnization of the intended marriage, to raise by mortgage the sum of 1,500*l.* to be paid to Sir Henry John Parker, in discharge of a like sum by him applied in payment of a mortgage upon the said estate at Tredington, and subject thereto, and to certain trusts for the renewal of the lease or leases by which the premises were held, and for the renewal of the lease of the said estate at Tredington, upon trust for Sir Henry John Parker for his life, and then upon trust to raise 500*l.* for Catherine Page, in the event of her surviving her intended husband, and subject thereto, upon trust, to raise such sums of money not exceeding 5,000*l.* for the portions of the daughters and younger sons of the intended marriage, as Sir Henry John Parker should appoint ; and in default of appointment, to raise and pay 5,000*l.* to such daughters and younger sons equally, and subject to the aforesaid trusts, upon trust, to raise and pay any sum not exceeding 1,000*l.*, as Sir Henry John Parker should appoint, and subject thereto, upon trust, for such son of the intended marriage as should be the heir of Sir Henry John Parker, and

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for default of such son and heir in being at the decease of Sir Henry John Parker, or then in *ventre sa mere*, upon trust for the daughters of the intended marriage, as therein mentioned.

The marriage between Sir Henry John Parker and Catherine Page was solemnized soon after the date of the above-mentioned settlement, and there was issue thereof one son, namely, John Parker, esquire; and two daughters, namely, Catherine Parker, afterwards the wife of Chichester Fortescue Garstin, esquire, and Margaret Sophia Parker, afterwards the wife of John Strode, esquire. Catherine Parker, formerly Catherine Page, the wife of Sir Henry John Parker, died in the year 1750, leaving her said husband and three children her surviving.

Besides the estates comprised in the settlements of October 1741, Sir Henry John Parker was entitled, under the will of Robert Hyde, esquire, to the reversion in fee simple of a freehold estate at Hatch, in the county of Wilts, expectant upon the death of the Earl of Clarendon without male issue; an event which happened about the year 1758. By indenture, dated the 25th of October 1753, and made between Sir Henry John Parker, of the one part, and John Page and Jonathan Tyers, of the other part, Sir Henry John Parker, in consideration of his natural love and affection for his children, John Parker, Catherine Parker, and Margaret Sophia Parker, and in consideration of 1,000*l.* paid to him by John Page, their maternal grandfather, settled a moiety of the Hatch estate to the uses following: (that is to say,) as to one moiety of such moiety to the use of himself, till John Parker, his son, should attain twenty-one, with remainder to John Parker, his heirs and assigns; and as to the other moiety,

to the use of John Page and Jonathan Tyers for 500 years, and subject to that term, to the use of John Parker, his heirs and assigns, the trusts of the term of 500 years were to raise portions of 4,000*l.* each for Catherine and Margaret Sophia Parker, subject to a proviso that if they died before the portions became payable, or married without the consent in writing of Sir Henry John Parker, if living, or of the trustees if he should be dead, such portions should not be raised, but should cease, for the benefit of the person or persons next in remainder. This settlement contained a power authorising Sir Henry John Parker, with the consent of John Page and Jonathan Tyers or the survivor, by deed or writing, executed in the presence of two witnesses, to revoke the uses, and create new uses, provided the same were for the benefit of the said John Parker, Catherine Parker, and Margaret Sophia Parker.

Sir Henry John Parker afterwards, in the year 1758, sold the other moiety of the Hatch estate to John Page.

Catherine Parker and Margaret Sophia Parker married without the consent of their father.

John Page, by his will, dated the 3d of January 1764, devised his freehold messuages, &c. in Throgmorton Street, London, and also his undivided moiety of the Hatch estate, which he had purchased of Sir Henry John Parker, unto and to the use of his grandson, John Parker, and the heirs of his body lawfully to be begotten, with remainders over; and he gave the residue of his personal estate to his three grand-children, John Parker, Catherine Parker, and Margaret Sophia Parker, equally to be divided between them. He died in the year 1765.

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John Parker attained the age of twenty-one years in the beginning of the year 1766, and thereupon he became seised in fee simple in possession of one undivided moiety of the Hatch estate, by virtue of the trusts of the settlement of the 25th of October, 1753; he was also, under the will of John Page, seised of an estate tail in possession in the other undivided moiety of the Hatch estate, &c.; he was also entitled, under the will of John Page, among other personal property, to a third part or share of a large bond debt due from Sir Henry John Parker to the estate of John Page. In the year 1767, John Parker levied fines, and suffered recoveries of the moiety of the Hatch estate, &c., and limited them, together with the other moiety of the Hatch estate, to which he was entitled, under the settlement of the 25th of October 1753, to such uses as he should by deed or will appoint, and for default of appointment to himself for life, with remainder to his father, in fee simple.

In the beginning of the year 1762, the creditors of Sir Henry John Parker had become pressing; several actions had been brought, and some judgments obtained against him; and his furniture and other effects at Talton, having been taken in execution, he borrowed a sum of 700*l.* of one John Treacher to satisfy the debt; and by a deed dated the 19th of January 1762, he assigned the furniture and the other effects to Treacher to sell, for the purpose of repaying his loan. By a subsequent deed, dated the 13th of February 1762, between Sir Henry John Parker, of the one part, and Thomas Snow, gentleman, of the other part, reciting the above-mentioned deed of the 19th of January 1762, Sir Henry John Parker assigned to

Snow the surplus money which should arise from the sale of the effects (after payment of the money due to Treacher, and the expenses), and also the rents and profits of all his estates (except those of the estate in Wiltshire, which came to him from Robert Hyde, amounting to the annual sum of 70*l.* or thereabouts), for a term of seven years, or until such time as the debts therein mentioned, and the incident charges, should be satisfied, upon trust, to apply the same in manner therein mentioned in or towards payment of the debts therein specified, which were then due from Sir Henry John Parker, and of such other debts as within the said term of seven years might appear to be justly due and owing from him.

The bill filed by the Appellant contained allegations to the effect before stated, and then proceeded to make the following case: —

Immediately after John Parker came of age, Sir Henry John Parker, with the view of relieving himself from his embarrassments, entered into an agreement with his son, by which the latter was to become a purchaser of his life estate and reversionary interest in the estates at Talton and Tredington, in consideration of a sum of 700*l.* and of an annuity of 200*l.* per annum, to be paid to him (Sir Henry John Parker) for his life. A deed, or an agreement in writing, was executed by Sir Henry John Parker and his son for carrying this arrangement into effect, or connected with it.

Mr. John Parker, soon after his attaining the age of twenty-one years, became, by virtue of the above-mentioned agreement with his father, entitled in any event, for the time being, to the estates at Talton and Tredington; and resided in the year 1768 at the mansion house at Talton. He also

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laid out a sum of 1,500*l.* in rebuilding the house in Salisbury Court; and exercised various acts of ownership over the property, particularly by granting a lease for twenty-one years.

Mr. John Parker having purchased another estate at Armscott, in the parish of Tredington, made his will, dated the 2d of August 1769, and duly attested so as to pass real estates, in which he described himself as of Talton; and thereby, after directing all his just debts to be fully paid and satisfied, he gave and devised all his freehold and leasehold estates whatsoever and wheresoever, that he was seised or possessed of, or otherwise was or should be entitled unto, in reversion, remainder or expectancy, unto his father the said Sir Henry John Parker, and his assigns, for his life; and from and after his decease, he gave and bequeathed his estate in Shorter's Court, and the moiety of his estate at Hatch, and all such other his real estates as were devised to him by the will of his late grandfather John Page, unto Henry Parker, esquire (the father of the Respondent), and Daniel Fox, their heirs and assigns for ever, upon certain trusts thereby declared, for the benefit of his sisters, Margaret Sophia Strode and Catherine Garstin; and in case his said two sisters should happen to die without issue before the above-mentioned estates should be conveyed to them by virtue of his will, then he directed that the same should be conveyed and assured unto his own right heirs for ever; he then gave and devised the manor and capital messuage called Talton, with the estate thereto belonging, the farms called Tredington Farm and Knowland's Farm, in the parish of Tredington, and all other his manors and estates in Worcestershire and Warwickshire, his house in Salisbury Court, the other

moiety of his estates at Hatch, and all other estates whatsoever and wheresoever, which descended or came to him, or which should descend or come to him from his father, to his two sisters, Margaret and Ann Parker, their heirs, executors, administrators, and assigns, for ever, as tenants in common, and not as joint tenants. The testator then, after giving a few legacies, gave all the rest and residue of his personal estate to his father, and appointed his father sole executor of his will, if he should be living at the time of his decease; but if his father should be dead, then he gave and bequeathed to his two sisters, Margaret and Ann Parker, all the furniture, plate, household goods, utensils, cattle, chattels, and all other things whatsoever that should be in his possession in and about Talton House, equally to be divided between them; and all other his personal estate that he should die possessed of, he gave and bequeathed equally amongst his four sisters, share and share alike; but in case his personal estate at the time of his decease should be insufficient for the payment of his debts and legacies, then he charged the same upon all his real estates; and in case his father should die before him, then he appointed the said Henry Parker and Daniel Fox executors of his will.

He afterwards made a codicil to his will, which is dated the 2d of September 1769, and which was duly attested so as to pass real estates, and thereby he gave and devised unto his father, his heirs and assigns for ever, the estate at Armscott. And after reciting that his father formerly executed a bond in the penal sum of 2,000*l.*, conditioned for payment of 1,000*l.* and interest to his late grandfather, John Page, the third part whereof, in case the same

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should be paid, would belong to him the testator, and the other two-thirds to his sisters, Margaret Sophia and Catherine, he declared his mind and will to be, that no part of the principal and interest due on the bond should be paid by his father, but that the same, &c. should be delivered up to his father to be cancelled. And his will was, that if any suit should be commenced against his father on account of the said bond, or otherwise, or against his sisters, Margaret and Ann Parker, or either of them, by his said sisters, Margaret Sophia and Catherine, or by their present or future husbands, or by the trustees under the will of his grandfather, or by any or either of them, or by any other person or persons, in order to obtain for his sisters, Margaret Sophia and Catherine, or for their husbands or children respectively, any further or other benefit or advantage than he had given them by his will, or in case any suit or prosecution should be commenced in order to vacate, defeat, or impeach his will, or the codicil, or the true meaning thereof, or of any part thereof, then and in either of the said cases, the person or persons so promoting any such suit or suits, and for whose benefit and advantage such suit or suits should be commenced or prosecuted, and his, her, or their issue respectively, should respectively forfeit and lose all benefit and advantage by virtue of his said will. And he did thereby revoke all the bequests in his said will in favour of such person or persons; and he did in such case or cases thereby give and devise all such estates real and personal, so by him meant and intended to be forfeited, unto his father, his heirs, executors, and administrators, for ever: and he appointed his father to be his sole executor.

Mr. John Parker died in September 1769, without issue ; he left Sir Henry John Parker, his father, and Margaret Parker and Ann Parker, his sisters of the half blood, and Catherine Garstin and Margaret Sophia Strode, his sisters of the whole blood, him surviving.

Sir Henry John Parker proved his son's will and codicil, as his executor, and received the arrears of rent due to him, and possessed himself of the rest of his personal estate, which he enjoyed for his own use without account. He also, in pursuance of his son's will, entered into the possession or receipt of the rents and profits of all the estates thereby devised to him, as well the settled estates, as those at Hatch, at Armscot and in Shorter's Court, which were exclusively the property of his son. On the 15th of December 1769, he gave a power of attorney to Stephens, to manage and let the houses in Salisbury Court and Shorter's Court (describing them as his houses), and to receive the rents and arrears of rent due in respect of them. Soon after his son's death, he borrowed a sum of 900*l.* of one Dorothy Tyler, upon the security of the estate at Armscot ; and by deeds, dated the 25th and 26th of May 1770, between himself, of the one part, and the said Dorothy Tyler, of the other part, he made a mortgage in fee to her of that estate, for the sum so borrowed and interest. In these mortgage deeds he described himself, as devisee under the will of his son, the said John Parker, and treated the estate as his absolute property, covenanting that he was seised in fee simple. He continued till his death in the enjoyment of the estates devised to him by his son ; and, in consequence of the provisos contained in his son's

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codicil, he was exonerated from the demands made upon him by the executors of Mr. Page and by Mr. and Mrs. Strode. The bond debt to Mr. Page's estate was not paid or demanded, and a suit which had been commenced by Mr. and Mrs. Strode was discontinued. It had abated by the death of Mr. John Parker, who was one of the defendants, and was not revived.

Sir Henry John Parker made a will, dated the 10th of November 1769, which directed that his debts should be paid. It then gave to Henry Parker (the father of the Respondent), and Daniel Fox, all that his manor of Talton, with its rights, members and appurtenances, and all that his capital messuage or tenement wherein he then dwelt, called Talton House, with the appurtenances, and all the farms, lands, tenements and premises thereunto belonging, and all other his freehold manors, farms, lands, tenements and hereditaments in Worcestershire and Warwickshire; and also his freehold house in Salisbury Court, Fleet Street, London, with the appurtenances, and also one undivided moiety or half part of the manor, estates, lands, tenements and hereditaments, situate at Hatch, or elsewhere, in the county of Wilts, and which descended to him as heir at law of the family of the Hydes; and also all other his freehold estates whatsoever, and wheresoever that he had a power of disposing of; to hold the same to the said Henry Parker and Daniel Fox, their heirs and assigns for ever, to the use of the said Henry Parker and Daniel Fox, their executors, administrators and assigns, for the term of 1000 years, and subject thereto, as to one moiety of the said estates, to the use of his daughter, Margaret Parker, for life,

with remainder to her first and other sons successively in tail male, with remainder to his daughter Ann Parker for life, with remainders to her first and other sons successively in tail male, with other remainders over, including a remainder to Henry Parker, the Respondent's father, for life, and a remainder to the Respondent in tail male; and as to the other moiety of the said estates, to the use of the said Ann Parker for life, with remainder to her first and other sons successively in tail male, with remainder to the said Margaret Parker for life, with remainder to her first and other sons successively in tail male, with remainder to the same uses to which he had limited the first-mentioned moiety.

This will then gave to Henry Parker and Daniel Fox all the testator's leasehold estates in the parish of Tredington, in the county of Worcester, and in the parish of Hampton in Arden, in the county of Warwick, and all other his leasehold estates whatsoever and wheresoever, with their appurtenances, for all the estates, terms of years, and interests which he should have therein respectively at the time of his decease, subject to the rents and covenants in the several original lease or leases reserved and contained, upon trust, to permit the same persons, one after another respectively, to enjoy his leasehold premises, and to receive the rents and profits thereof, in the same manner as such persons would by his will be entitled to his freehold estates, it being his intent that his leasehold estates should be enjoyed with his freehold estates, and remain and continue to the same persons, and to the same uses, as long as the law would permit.

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The will then declared, that the term of 1000 years was limited to Henry Parker and Daniel Fox, upon trust, by sale or mortgage of the estates, or with the rents and profits, or otherwise, as they might think fit, to raise such sum of money as should be sufficient and necessary for the payment of his just debts and legacies, or any part thereof, in case his personal estate should be insufficient for those purposes ; and also such further sums of money as should from time to time be sufficient and necessary to pay any fines for the renewal of any lease or leases, or putting in any life or lives in the place of such as might happen to drop in such leasehold premises ; and that all such new leases should be vested in the said Henry Parker and Daniel Fox, upon the same trusts as thereinbefore declared concerning the said leasehold premises ; and that in case the several sums of money above mentioned should be paid as they were wanted, by the person or persons to whom the immediate reversion or remainder of the premises expectant upon the term of 1000 years should for the time being belong under the will, then the said monies should not be raised by virtue of the term, but the said term should cease for the benefit of such person or persons.

The will then proceeded as follows : — “ And
“ whereas by the last will and testament of John
“ Page, late of Putney, in the county of Surrey,
“ esquire, deceased, several sums of money therein
“ particularly mentioned are given to his grand-
“ son, my late son John Parker, esquire, deceased,
“ his executors or administrators, upon the contin-
“ gencies in such will particularly expressed ; now
“ my will is, that in case any sum or sums of

“ money shall become due and payable to, or be-
 “ come vested in me, as executor of my said son
 “ John Parker, or to my executors or adminis-
 “ trators by virtue of the said will, then I do give
 “ and bequeath all such sum and sums of money as
 “ I am, can, shall, or may be entitled unto, or have
 “ a power of disposing of, unto the said Henry
 “ Parker and Daniel Fox, their executors, admi-
 “ nistrators and assigns, upon trust, nevertheless
 “ and to the intent and purpose that they the said
 “ Henry Parker and Daniel Fox, or the survivor
 “ of them, his executors or administrators, do and
 “ shall as soon as conveniently may be, after the
 “ said trust monies shall become vested in them
 “ by virtue of this my will, lay out and invest such
 “ trust monies in the purchase of freehold lands,
 “ tenements, or hereditaments, in the counties of
 “ Worcester or Warwick, which when purchased
 “ shall be conveyed unto the said Henry Parker
 “ and Daniel Fox, or to some other proper trus-
 “ tees, and their heirs, upon trust, and to and for
 “ and upon such and the same uses, trusts, estates,
 “ intents and purposes, and under and subject to
 “ the same provisoes and powers as are above
 “ mentioned, expressed, and declared of and con-
 “ cerning the said freehold estates by virtue of this
 “ my will: and whereas by virtue of the last will
 “ and testament and codicil of my said late son
 “ John Parker, deceased, I may become entitled
 “ to certain devised estates therein particularly
 “ mentioned, by reason of certain forfeitures
 “ therein also mentioned, which will become vested
 “ in me, my heirs, executors, and administrators,
 “ when such forfeiture or forfeitures shall be in-
 “ curred; now I do hereby give, devise, and be-

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“queath all the freehold and leasehold estates,
 “lands, tenements, and hereditaments, which I
 “can, shall, or may be entitled unto by virtue of
 “the said will and codicil of my said son, or other-
 “wise howsoever, with their and every of their
 “appurtenances, unto Henry Parker and Daniel
 “Fox, their heirs, executors, administrators, and
 “assigns, upon trust, to and for and upon such
 “and the same uses, trusts, estates, intents, and
 “purposes, and under and subject to the same
 “provisoes and powers as are above mentioned,
 “expressed, and declared of and concerning the
 “same freehold estates by virtue of this my will.”

The testator then, after giving some pecuniary legacies, bequeathed all the rest and residue of his personal estate, of what nature or kind soever that he should die possessed of, unto his two daughters, Margaret Parker and Ann Parker, their executors, administrators, and assigns, for ever; and he appointed his said two daughters, Margaret and Ann, executrixes of his will.

By a codicil, dated the 18th of June, 1771, Sir Henry John Parker, after reciting that he had by his will given all the freehold and leasehold estates which he should die possessed of, and that he had the power of disposing of, unto his trustees, Henry Parker and Daniel Fox, upon the above-mentioned trusts, limited remainders in the same estates to his daughters, Mrs. Strode and Mrs. Garstin, and their first and other sons in tail male, to take effect after the limitations in his will to his daughters Margaret Parker and Ann Parker and their issue, and previously to the other limitations contained in his will. By this codicil he also directed his trustees, Henry Parker and Daniel Fox,

to raise, by sale or mortgage of such parts of his freehold and leasehold estates as they should think fit, such sums of money as should be sufficient to discharge his debts and legacies, and also for the renewal of any lease or leases, so that all his personal estate might be exonerated from all such debts and legacies, and fines for the renewal of leases, and go clear to his executrixes.

Sir Henry John Parker died about the month of October 1771. He left his four daughters, Margaret and Ann Parker, Mrs. Strode, and Mrs. Garstin, his co-heiress at law. Upon his death, Margaret and Ann Parker entered into possession of the estates at Talton and Tredington, and of the house in Salisbury Court, as well as of the other estates devised to them by their brother, Mr. John Parker, and they from time to time renewed the lease for lives of the leasehold part of the estates.

Daniel Fox died in the life-time of Henry Parker. The Respondent was the personal representative of his father.

Margaret Parker died in the month of May 1785, having by her will, dated the 1st of May 1780, and duly attested so as to pass real estates, devised all her estates to her sister Ann Parker, her heirs and assigns, and bequeathed the residue of her personal estate to her said sister, whom she appointed her executrix. She left her sister heiress at law.

Upon the death of Margaret Parker, Ann Parker entered into the possession of the estates at Talton, Tredington, and in Salisbury Court, and of the other estates devised to her and her sister by their brother, and continued in possession of the same until her death, and from time to time renewed the lease for lives of the leasehold part of the premises.

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Ann Parker made her will, dated the 1st of August 1811, and duly attested so as to pass real estates, and thereby devised the house in Salisbury Court to the Appellant, his heirs and assigns for ever; and she devised the manor and mansion-house at Talton, the farm at Tredington, and the estates at Hatch, to Harry (Henry) Parker (the father of the Respondent), in fee simple; and she appointed the Respondent to be her executor, and gave him a legacy of 500*l.*, and gave the residue of her personal property to the Appellant and his sister. This will was made with the knowledge and privity of the Respondent and his father.

Harry Parker died in the life-time of Ann Parker. Ann Parker died in January 1814, without issue, leaving the Appellant her heir at law, who was also heir at law of John Parker, of Mrs. Strode and Mrs. Garstin, and of Sir Henry John Parker.

Upon the death of Ann Parker, the Appellant, as heir at law, entered into possession of the mansion-house and estate at Talton, Tredington, and in Salisbury Court, or the chief part thereof; and the Respondent afterwards brought an ejectment against him, to obtain possession of the mansion-house at Talton, and gave notice to the tenants not to pay their rents to the Appellant, in which action judgment was obtained by default.

The original bill was filed by the Appellant on the 26th of August 1814, in the High Court of Chancery, stating the circumstances of the case to the effect hereinbefore stated, and praying that it might be declared that Sir Henry John Parker, by accepting the benefits given to him by the will and codicil of John Parker, his son, elected and bound

himself to conform thereto, in regard to the devises contained in the will of the settled estates; and that under the circumstances therein mentioned, the Appellant was entitled to the said estates, and that he might be quieted in the possession thereof; and that the Respondent, his attornies and agents, might be decreed to convey or release the same to the Appellant, and produce and deliver up to the Appellant all title-deeds, evidences, and writings relating to the said estates, and for an injunction to restrain the Defendant's proceedings at law.

The Respondent appeared, and put in an answer to the original bill, claiming to be entitled as tenant in tail, under the will of Sir Henry John Parker. Exceptions to the answer were taken and allowed, and the Appellant afterwards amended the original bill.

The Respondent in the mean time proceeded in his ejectment, and obtained judgment thereon; and the Appellant on the 8th of May 1815 exhibited a supplemental bill against the Respondent, praying that the Respondent might elect whether he would take under or against the will of Ann Parker, and that the Appellant might be quieted in the possession of the estates and premises at Talton and Tredington, or that a receiver might be appointed thereof, and that an account might be taken of the rents and profits thereof received by the Respondent, and of the timber cut by him; and that the Respondent might be ordered to pay such rents and profits, or the value of such timber, to the receiver or into court, and for an injunction to restrain the Defendant from committing waste, and from proceeding at law. The statements in the supplemental bill related chiefly to communications

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between the Appellant and Respondent, and to proceedings at law as to the possession of the mansion house at Talton, not material to the question of the equitable title to the estates.

The Respondent put in his further answer to the original bill, and his answer to the amended bill and the supplemental bill.

By his answer to the original and amended bill, the Respondent admitted the settlement of October 1741, but denied all knowledge of the facts alleged, as to the distressed circumstances of Sir Henry John Parker. He admitted his belief of the articles of agreement of February 1766, but stated that they contained a special proviso that such agreement, and any deeds to be made in pursuance of it, should be void in case of the death of the son in his father's lifetime. He stated the loss of the original agreement, and referred to an abstract of it which was in the handwriting of Mr. Hunt, the family solicitor, and was introduced by him into the draft of a case which was laid before counsel. He denied, to his belief, that John Parker, the son, was ever let into possession of his father's estates under such agreement, or ever resided in Talton House as owner, but alleged that he lived there as an inmate with his father. He admitted the will of John Parker, and his death unmarried, but denied that Sir Henry John entered upon all the estates thereby devised to him for life, or in any other manner than as he was possessed thereof under his marriage settlement before his son's death. He admitted that Sir Henry John entered upon the Armscott estate, which was devised to him by his son's codicil, in fee; and said he be-

lieved that Sir Henry John always treated and considered the will of his son as void, so far as it affected to devise the family estates, and did not elect to take according to it. He admitted the death of Sir Henry John, and his will, but insisted that his two daughters, Margaret and Ann, entered into possession of the estates thereby devised to them as claiming under that will, and not under their brother's; that Margaret and Ann did by executing divers mortgages and other deeds, in which the will and codicil of their father were recited as the foundation of the transactions therein stated, and by which deeds the family estates were mortgaged to raise money to pay the debts of Sir Henry John in order that his personal estate might go clear to his daughters, and also by divers letters, admitted and shewed themselves as taking under the will of their father, and not their brother. He said he believed that Sir Henry John devised to his trustees his leasehold estate at Tredington, held under the bishop, and authorized his trustees to raise money by mortgage for the renewals thereof; and that they did raise money by mortgage for the purpose, with the consent of Margaret and Ann Parker, who were parties to such mortgage; and that Ann Parker (some years) afterwards paid off such mortgage, and took an assignment thereof in trust for herself. He insisted that Margaret and Ann Parker, by their several acts, after the death of their father, bound themselves in equity not to disappoint his will, and that their heirs claiming under them are in like manner bound. He said he believed that Sir Henry John died indebted to some amount, and gave legacies

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by his will beyond the amount of his personal estate, which were satisfied by the means before stated. He admitted the death of his father Sir Henry Parker in the lifetime of Ann Parker, but insisted that the estates devised by her to Sir Harry had not descended to the Plaintiff as her heir, but belonged to the Defendant under the will of her father. He claimed to be entitled to the estates as a remainder man in tail under the will of Sir Henry John Parker; and (subject to the opinion of the Court) he claimed the house in Salisbury Court in opposition to the will of Ann Parker, and also insisted upon retaining the legacy of 500*l* thereby given to him.

After the coming in of this answer, an injunction which had been obtained by the Plaintiff for want of answer in time was dissolved on the merits. Issue being joined in the cause, witnesses were examined, and evidence entered into on both sides, consisting chiefly of the documents before stated.

On the part of the Respondent, proof was given (among other things) of the deaths of the several persons to whom Sir Henry John Parker had, by his will, limited his Talton and other estates, comprised in the settlement of 1741, precedent to the Respondent; and of the hand-writing of Ann Parker to (among other papers) the letters addressed by her to Sir Henry Parker, and also the hand-writing of Mr. Hunt to the abstract of the agreement of February 1766, with the notes at the foot of it.

On the 2d of June 1818, the cause came on for hearing before Sir *Thomas Plumer*, then Master of the Rolls, who, after a hearing of several days,

made a decree *:—“ That the Plaintiff’s bills (except so much of the supplemental bill as prayed that the Defendant might elect whether he would take under or against the will of Ann Parker in the pleadings named) should stand dismissed out of that court; and that the Defendant Sir William Parker, by his counsel then electing to take against the will of Ann Parker the premises in Salisbury Court, London, therein mentioned to be devised to the Plaintiff, his Honor declared, that the Defendant was bound to relinquish the legacy of 500*l.* by the will given to him, and that he was bound to account for the personal estate of the said testatrix, without retaining the same. And his Honor ordered and decreed, that the Defendant Sir William Parker should be let into possession of the house and premises situate in Salisbury Court, with liberty for the parties to apply to the court as there should be occasion.”

On the hearing of the cause at the Rolls, the Appellant was unable to make out the fact of the agreement as alleged by his bill to have been made between Sir Henry John Parker and his son Mr. John Parker; and the Respondent not having the original agreement in his possession, with the conditions annexed to it, as stated in his answer, attempted to prove the same by the secondary evidence of the abstract hereinbefore stated; but such evidence was rejected by the Master of the Rolls: the fact of the agreement was therefore, on both sides, put out of the question.

The decree of the Master of the Rolls was afterwards passed and entered; but the Plaintiff con-

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* See the Report, 1 *Swan*. 359.

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ceiving himself aggrieved thereby, on this day presented his petition to Lord *Eldon*, then Lord Chancellor, and thereby prayed that the decree might be reversed, and that in the meantime all further proceedings in the cause might be stayed.

The petition and appeal came on for hearing before Lord *Eldon* in the month of April 1822, and on the 4th day of May he pronounced his judgment*, affirming the decree of the Master of the Rolls.

On this appeal to the Lord Chancellor, the Appellant, thinking he might better his case by proof of the agreement between Sir Henry John Parker and his son, referred to the answer of the Respondent upon the subject, which was therefore read, and established the fact of the agreement with the special condition annexed to it, as stated in the Respondent's answer.

The appeal was against these decrees.†

For the Appellant.—Mr. John Parker, by the effect of arrangements made between himself and his father, after his attaining the age of twenty-one years, had acquired, or ought to be presumed to have acquired, a title to the estates in question in this suit, and more especially to the house in Salisbury Court, by virtue of which the same passed by his will, and became vested in Margaret Parker and Ann Parker. If Mr. John Parker had not acquired a title to the estates in question, enabling

* See the Report, 1 *Jacob*, 505.

† The case before the House of Lords was first argued in 1830 by Mr. Dillon the Appellant for himself, and by Mr. Horne and Mr. Pepys for the Respondent; and Mr. Dillon being taken ill before the conclusion of the reply, the case was again argued in 1833 by Sir Edward Sugden for the Appellant, and by Sir W. Horne and Mr. Pepys for the Respondent.

him to devise the same, Sir Henry John Parker, by accepting the benefits conferred on him by the will and codicil of his son, and by claiming under the same, elected and bound himself to confirm the will and codicil, and to give effect to the devise of the estates therein contained. *Edwards v. Morgan*.* The will and codicil of Sir Henry John Parker, taken together, did not in the sound construction thereof, and in the state in which his affairs were at the time of his death, raise a case of election as against Margaret Parker and Ann Parker; nor did they take any benefits under the will and codicil of Sir Henry John Parker. Margaret Parker and Ann Parker did not in any manner relinquish, or bind themselves to relinquish, their right and title to the estates in question; and Ann Parker, by her will (made with the privity of the Respondent, and without objection on his part), expressly asserted her right to the same. The possession and enjoyment of the estates in question, having during the period between the death of Sir Henry John Parker and the death of Ann Parker been consistent with the title of the Appellant, his claim has not been barred or prejudiced by length of time.

For the Respondent.—The will of John Parker the son did not raise any case of election as against Sir Henry John Parker his father; and if it had raised any such case of election, Margaret and Ann Parker, the daughters of Sir Henry John Parker, could alone have called upon their father to elect, and they never did so; and he never elected to renounce his title to the property claimed by the

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* 1 *Bligh, New Ser.*, 404.

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Appellant. Margaret and Ann Parker not only did not call upon their father to elect, but they took large benefits under the will by which he disposed of the property claimed by the Appellant; and they by repeated acts confirmed the dispositions made by the will of their father, and elected to take under it; and it is therefore not competent for the Appellant, claiming under them, now to dispute the dispositions of that will. The equity under which the Appellant claims, if any such ever existed, arose upwards of forty-three years before the bill was filed, and never was asserted by the parties through whom the Appellant claims. *Cholmondley v. Clinton*.*

August 19.

Lord *Lyndhurst*. — I propose to move your Lordships for the judgment of this House in the case of *Dillon v. Parker*, which was argued last week at your Lordships' bar. It is the case of an appeal from a decree of Lord Chancellor *Eldon*, which decree affirmed a previous decree pronounced at the Rolls by Sir *Thomas Plumer*, when he presided in that court. The question relates to certain property that formed the subject of the marriage settlement of Sir Henry John Parker, in the year 1741. There is no question that the title at law to this property belongs to Sir William Parker, who is the Respondent in this case; indeed the very proceeding that has been adopted is an admission that the title at law belongs to him; but it is contended that circumstances of equity arose many years back, as far back as the year 1769 or 1771, which gave to the Appellant an equitable right, sufficient to control the legal right

* 4 *Bligh's Rep., Old Ser.*, p. 1.

of Sir William Parker. Now, where the legal title is admitted, the party who insists on an equitable title for the purpose of over-reaching and controlling the legal title must make out a clear, distinct, and satisfactory case; and the question will be in this cause, whether your Lordships are of opinion, upon the argument which was delivered at your bar, that such a satisfactory case of equity has been made out as ought to induce your Lordships to give judgment in favour of that equitable title so as to displace the legal title of the Respondent.

The first question which arises in this case is upon the will of Mr. John Parker, the son of Sir Henry John Parker. It is argued on the part of the Appellant, that that will tendered a case of election. Undoubtedly the Master of the Rolls, when the case was before him, gave it as his opinion, that that will did raise a case of election; but when the case was before the Master of the Rolls, the agreement entered into between the father and the son was not in evidence before him. Some attempt was made to introduce that agreement, but that attempt entirely failed. When the case came before Lord *Eldon* in the Court of Chancery, that defect was supplied: evidence of the agreement was given by the Appellant; he read that agreement, as part of his evidence, out of the answer of the Defendant; and taking the facts contained in that agreement as proved, and considering the rights and situation of the parties in consequence of it, connected with the obscure inaccurate terms of the will of Mr. John Parker, Lord *Eldon* was of opinion that it was extremely difficult, if not impossible, to come to a satisfactory conclusion as to what the will of testator really was.

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I have read that will again and again — I have attended to the very able argument which has been addressed to your Lordships upon the subject of it; and I confess that at this moment I find great difficulty in coming to any satisfactory conclusion—any sound conclusion, as to what the will of the testator really was. Whether he intended, in the event of his dying in the lifetime of his father, to dispose of that property or not, is extremely questionable; and unless I can see my way so as to ascertain with some degree of satisfaction to myself what the meaning of the testator was, the very foundation upon which a case of election is to be raised must altogether fail.

But I will assume, for the purpose of argument for a moment, that it was the intention of Mr. John Parker to raise a case of election: the next point which it is absolutely necessary for the Plaintiff to establish to your entire satisfaction is this, that Sir Henry John Parker did elect to take under that will, and not adversely to the will. Now upon the evidence I find nothing clear or satisfactory, to my mind, to show that he made any election to take under that will. Looking at it myself, I am not satisfied that Sir Henry John Parker even knew he was bound to elect under that will; I am not satisfied that he even thought a case of election was raised, so as to call upon him to elect; and I find nothing to satisfy me either that he thought he was bound to elect, or even that he had the means to take under that will rather than in opposition to it. Undoubtedly I find that he took benefits, and considerable benefits, under the will; but at the same time I find evidence to shew that he acted in opposition to

that will. I think, according to the language of Sir Thomas Plumer, that the evidence is as strong to show that he acted in opposition to the will, as that he adopted or acted upon it.

It was said in the course of the argument, and said with great truth, that he took considerable benefits under the will, and that it was more beneficial for him to adopt that will. That would be an argument if he had been called upon and required to elect, or if his attention had been directed to the subject to show how he had made his election; but there is no evidence to show that his attention was directed to the subject, and I find that in a very few months after the death of the testator (Mr. John Parker), Sir Henry took a course directly at variance with that will, and resisted the provisions of the will as strongly as it was possible for him to do. Instead, therefore, of being satisfied that the Plaintiff has made out a case in equity, founded, first, upon a case of election being tendered under that will, and, in the next place, of Sir Henry Parker having actually elected to take under the will; if I were called upon to come to a conclusion, the conclusion in my mind would be rather that the will did not tender a case of election, and that Sir Henry Parker never did elect to take under that will, that he manifested as strong an intention to take adversely to that will, as he did to elect to take under that will, and that no case of election had been made out.

Much argument was addressed to your Lordships from the bar, with respect to the effect of the agreement. That agreement, containing the *proviso*, was made evidence by the Appellant him-

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self, for he read it from the Defendant's answer, and there is nothing in the case whatever, therefore, shewing that that agreement was not an existing and binding agreement between these parties. It is said, that the *proviso* is not distinctly set out and stated in the answer; I think it is sufficiently stated for the purpose of leading your Lordships to a distinct understanding of what the proviso really was. If it is not sufficiently stated in the course of the pleadings, that might have been set right by the Appellant.

It was stated also at the bar, that the proviso was an unreasonable proviso, that the agreement taken in connection with the proviso was altogether unreasonable and improper. I entirely agree with the Noble Lord who presided in the Court of Chancery at that period, that it is quite impossible for us at this distance of time, sixty years after the transaction, to say whether or not that agreement was reasonable or unreasonable as between these parties. Something must depend upon their situation, upon the state of the family; and with respect to the stipulation as to not marrying without the consent of the father, it is to be observed, that the same stipulation was attached to the daughters; they, also, if they married without his consent, forfeited part of their inheritance as a consequence.

It was further argued at the bar, that there was a ground to presume that by some subsequent agreement this proviso was discharged. I find nothing to lead to a satisfactory conclusion of that having been the case; it is mere conjecture, mere probability, or rather possibility. I find nothing laying the foundation for your Lordships to presume any such fact.

It was further argued with respect to another part of the property, namely, the house in Salisbury Court, that the house was disposed of by the father in favour of the son. I do not find any sufficient evidence to satisfy me of that fact. That the son took some interest in the property, and that he took an interest coupled with a power sufficiently extensive to authorize him to grant a lease for twenty-one years, I do not deny, but we have no further evidence to satisfy us what the nature of that interest was. We are on these subjects in consequence of the lapse of time, and the death of the persons who were witnesses to these transactions, altogether in the dark. I think therefore, as to the first part of the case, if the question were to rest here, the Appellant has not succeeded in establishing any such case of equity, as it would be necessary for him to establish before he could have a right to ask for your Lordships' judgment to displace the legal title of Sir William Parker.

But this is not all ; the Plaintiff has another difficulty to contend with, a difficulty arising out of the will of Sir Henry Parker. Sir Henry Parker's will (it appears to have been admitted) contained a case of election, and I think there can be no doubt upon the evidence that if that will contained a case of election, Margaret and Anne Parker did elect to take according to that will. The evidence arising out of the deeds which were executed during the life of Margaret and Anne, (I do not speak so much in respect to the operation of these deeds, and the points to which they were addressed, as to the statements and the recitals of acknowledgment contained in them) shows at least to my satisfaction beyond all doubt, that they intended to take under

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their father's will, and not under the will of their brother. They describe themselves as devisees for life, and entitled for life under that will, they describe themselves as holding under that will, and in addition to this, after the death of Margaret, there are letters coming down to a very late period written by Anne, in which she also describes herself during the whole of that period as holding this property under the will of her father: as far therefore as declarations made by parties can go as evidence of their intention, we have that evidence for the purpose of shewing that these ladies intended to take under the will of their father, and not under the will of their brother.

We are asked what motive could they have for preferring to take under the will of their father. The estate of Armscott it is said was mortgaged nearly to its full value, and with respect to the personal property it was not equal to the amount of the debts. I again repeat what I before said, that at this distance of time, it is not possible for us to say what motive they had for their conduct; they might have thought that the settlement of the property by their father was a good, judicious and proper settlement. Many other motives which we cannot now discover might have operated upon their minds: it is sufficient for us, however, to see that in their declarations they over and over again state that they held and enjoyed this property under the will of their father, without at this distance of time thinking it necessary for us to do that which the death of witnesses renders it impossible to do, namely, to ascertain precisely what the motives for this election were.

It has been further said, that they were misled

by their law agents: reference has been made to a case that was stated for the opinion of Mr. Maddocks, and it has even been suggested that a gentleman of the name of Fox, who was one of the trustees, and was by profession a solicitor, was induced to mislead these ladies in consequence of some small pecuniary benefit, namely, I think, a legacy of about 50*l*. I admit that there is in the statement of the case for Mr. Maddocks no reference to this question of election; but Mr. Hunt, the law adviser of these ladies, lived in their neighbourhood, they were in constant communication with him, they must have known the will of their brother, and in all probability were acquainted also with the agreement entered into between the father and the son; and it is impossible for us, at this distance of time, to conjecture as to what took place between the parties at that time, as to the reasons for what they did or did not do.

It is said that, these transactions having taken place in the year 1771 or 1772, in the year 1780 Margaret made her will, by which she disposed of the bulk of her real property, describing it as having come to her under the will of her brother. Under what circumstances that will was made, we are not informed; but after her death, Anne, her heiress at law, succeeded to it. It is through Anne Parker that the present Defendant claims, and after the death of Margaret, those letters were written in which she recognizes herself as holding under the will of her father, and those circumstances occurred to which I have referred. It appears to me therefore upon this part of the case, which raises a difficulty, we must come to this conclusion: either that these ladies elected to take under the will of their

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father, or, living at the time, they knew what the transaction was between their father and brother, they knew the intention of their brother, and they did not suppose their brother intended to raise a case of election, but they considered their father as entitled to this property.

Independently of these considerations, there is the question of time. The learned counsel at the bar stated, that he did not understand how this question was raised. It appears to me extremely plain and simple. Time at law is a sufficient bar; and here is an equity which arose as far back as the year 1769. Those persons under whom the present Plaintiff claims, had an opportunity at that time of raising this question of equity, and had an opportunity of calling upon their father to elect: they did not do so. This question of equity, if it ever existed, was not raised at that time, the right was never challenged, it has been suffered to lie dormant sixty years (upwards of forty after the date of the will), and it appears to me, according to the principles of Courts of Equity, this alone would be sufficient as a bar. Upon the whole view of the case my advice and motion is, that the judgment of the Court below be affirmed.

Upon a question suggested as to costs, after observations made by the agent for the Respondents and Sir Edward Sugden—

Lord *Lyndhurst* said: It is at first view a most involved and complicated case, undoubtedly, arising out of transactions occurring many years ago. I should propose an affirmance without costs.

Judgment affirmed.

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THE KING OF
SPAIN
vs
HULLETT.

ENGLAND.

(COURT OF CHANCERY.)

His Catholic Majesty FERDINAND }
the Seventh, King of *Spain* and } *Appellant* ;
the *Indies*

J. HULLETT and C. WIDDER - *Respondents.*

The King of Spain having filed a bill in the Court of Chancery against H. & W., charging them with the receipt of money from his agents, a demurrer was filed to the bill, on the ground that a sovereign prince could not sue in England. The demurrer having been overruled, the Defendants filed a cross bill against the King of Spain, seeking discovery and relief, and put in an answer to the same effect as the cross bill. Upon which it became necessary for the Plaintiff to amend his bill; and having so amended his bill, the Defendants obtained an order for the usual time to answer the amended bill after the original Plaintiff should have answered the cross bill.

Whereupon a motion, supported by affidavit, was made on behalf of the King of Spain, that he might answer the cross bill by deputy, &c., submitting that it should have the same effect in all respects as if put in upon oath, or that the answer might be taken without oath or signature.

This motion was refused by order of the Court below, and the order affirmed upon appeal.

ON the 22nd of December, 1827, the Appellant, by the style of "His Catholic Majesty Ferdinand the Seventh, King of Spain and the Indies, now residing at his palace of the Escorial, near Madrid,

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in the kingdom of Spain," filed his original bill of complaint in the Court of Chancery in England, against the Respondents, and against one Don Justo José de Machado. That bill stated two public treaties, the one bearing date the 30th day of May, 1814, and the other the 20th day of November, 1815, between the governments of France, Russia, Austria, Prussia, and England, and to which the government of Spain was an acquiescing party, whereby (among other things) the French government undertook to indemnify (in manner therein mentioned) the subjects of Spain, in respect of the losses sustained by them in consequence of the invasion of the Spanish territories by the French government in the year 1808.

The bill further stated divers other treaties and conventions, in consequence of which large sums of money had been paid into the hands of Machado as an agent of the King of Spain, to be applied to the purposes stipulated and provided in the treaties and conventions, and that a considerable part of the funds had been transferred by Machado to the Respondents, and then remained in their hands.

The prayer of the bill was, that an account might be taken, under the direction of the Court of Chancery, of all the sums of money which had been paid to or deposited with the Respondents by Don Justo de Machado, and of the funds brought over by him to this country, and that the amount thereof might be ascertained and paid over by the Respondents to the Appellant or his agents, &c.

Process to appear to and answer the bill was prayed against the Respondents, and against Don Justo de Machado, when he should come within the jurisdiction of the court.

The Respondents appeared to the bill, and on the 31st of January, 1828, filed a general demurrer; and for cause of demurrer, showed that the Appellant had not by his bill made such a case as entitled him in a court of equity to any relief against the Respondents; that the Appellant had not made Achilles de Pereira a party to the bill, nor prayed process against him, neither had the Appellant made parties to the bill, nor prayed process against any or all of the persons, who, according to the statements in the bill contained, had been or were entitled to claim a beneficial interest in the monies in the bill mentioned.

The demurrer was argued on the 22nd day of March, 1828, before the Lord Chancellor, and by his order overruled.

The Respondents thereupon appealed from the order to the House of Lords.

The appeal* was heard on the 18th day of June, 1818, and was dismissed without costs.

On the 3d of July, 1828, the Respondents filed their cross bill, in the Court of Chancery, against the Appellant and Don Justo de Machado. The cross bill, after setting forth the material allegations, and the prayer of the original bill, contained the following statements and charges: —

That many of the allegations in respect of which these Respondents were made parties to the said original bill were not according to the truth, and that the Appellant, his said Catholic Majesty, had in his power, and in the power of his agents, servants, and ministers, and other persons acting in his behalf, various papers, writings, documents, and statements, by which, if produced, it would appear

* See the Report, *antè*, vol. ii. p. 31.

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that many or some of the allegations in the said bill were not according to the truth, and by which also the truth of many other circumstances would appear, whereby it would be shewn that the Appellant had no title to relief against the Respondents, or either of them, in that court, in respect of any of the matters in the bill mentioned.

That the Respondents had lately discovered, and the fact was, that on or before the 30th of May, 1814, divers French authorities, and persons acting on behalf of the French government, entered, for valuable consideration, into contracts and other legal obligations, whereby the said government became bound to pay certain sums to various individuals, subjects of Spain; and that, by the treaties, herein-before mentioned, to which the King of Great Britain and Ireland was a party, the government of France contracted with, and became bound to the King of England, to satisfy the said debts; and for that purpose it was stipulated, by the last-mentioned treaties, that a fund should be provided, which was to be invested in the names of commissioners to be appointed as therein mentioned; and that no power over the said fund was given to the King of Spain, nor could any part of the said fund, consistent with the said treaties, be placed at his disposition or under his controul; and that the fund provided for the payment of the said claims was to consist of certain *rentes* inscribed on the great book of the public debt of France, in the name of commissioners, which *rentes* were to remain in specie till the particular claims which were to be satisfied thereout were ascertained, and the said *rentes* were, at the option of creditors

whose claims were allowed, either to be transferred to them in specie, or to be sold for the payment of the sums ascertained to be due to them, and not otherwise, or at any other time.

That if the secret treaty in the original bill mentioned as bearing date in March, 1818, was concluded between the King of France and the King of Spain, special instructions were given by said last-mentioned kings to keep the said treaty secret from the ministers of the different allied powers, and particularly from the ministers of Great Britain, and from the Duke of Wellington, who would not have acceded to such public treaty had they been aware of the private treaty or convention; and that Respondents had also lately discovered, and the fact was, that after the said months of March and April, 1818, three commissioners who held their sittings at Paris, and who were duly authorised to liquidate and allow claims of Spanish subjects, creditors of France, under the aforesaid treaties, did liquidate and allow divers of such claims to a very great amount; and that some of the said claims so allowed, as well as others of the said claims, as being acknowledged rights under the said treaties, had been openly bought and sold, with the privity and knowledge both of the King of Spain and the King of France, and their respective agents; and that by such sales and transfers many of the said claims became and then were the property of French and British subjects, and that his Catholic Majesty, and his agents and ministers duly authorized, had acknowledged and recognized divers of such claims, and admitted that the persons to whom they had been

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so transferred were entitled to receive payment of the sums, which had been or which should be awarded in respect of such claims.

That before the 1st of January, 1820, his said Catholic Majesty issued a decree, by which he placed the 850,000 francs of rentes mentioned in the public treaty of April, 1818, at the disposition of the minister of war, for the expenses of a certain expedition then preparing against certain provinces or states of South America, and he unduly got possession of considerably more than 15,000,000 francs of that money, and actually expended great part of the same in fitting out vessels of war for other similar purposes.

That his said Catholic Majesty, having hitherto misapplied every portion of the said trust funds of which he had been able to obtain possession, was not entitled to the assistance of that court in order to give him possession of any other part of the funds which might have arisen under or been provided for the purposes of the therein-aforesaid treaties; the more especially as he intended and admitted that he intended to apply the monies in the said original bill, alleged to have been paid to or deposited with the Respondents, as well as all the funds alleged therein to have been received by Don Justo de Machado, to the general purposes of his government; and as evidence to shew that his Catholic Majesty was not entitled to have the possession of any part of the said monies, and ought not to have the assistance of that court for that purpose.

That, in consequence of the misapplication of the funds, divers persons whose claims ought to have been satisfied out of the funds so provided as

therein aforesaid for the discharge of the debts so due as therein aforesaid to Spanish subjects, and particularly divers French subjects who had become owners of those claims by purchase, made application to the French government on the subject, insisting that under the treaties the said funds ought not to be placed at the disposition of his Catholic Majesty, and that thereupon the French government placed the residue of the funds provided as aforesaid by the said treaties under sequestration; and that his said Catholic Majesty then entered into a negociation with the individuals at whose instance, and to protect whose rights the funds had been so placed under sequestration, and it was finally agreed between the said individuals and his said Catholic Majesty that they should receive an immediate payment of twenty per cent. on their respective claims, in consideration of their interposing no obstacle to his obtaining possession of the residue of the first moiety of the said 1,850,000 francs de rente, and that he should in no way interfere with the aforesaid other moiety thereof.

That accordingly, about 1,600,000 francs, part of the said residue, were paid over to one Mr. Perrier, who was himself a purchaser of claims on behalf of himself and other individuals, at whose instance the sequestration was imposed, and the remainder thereof, amounting to about 1,300,000 francs, came into the hands of his said Catholic Majesty, and was employed by him in the same manner as the funds therein-before mentioned to have been misapplied by him.

That subsequently to April 1822, his said Catholic Majesty improperly obtained possession

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of four-twelfths of the said overplus of *rentes* in the original bill mentioned, the whole of which was misapplied by him as aforesaid, nor was any part thereof applied to the discharge of the demands of any of the persons entitled under the treaties.

As additional evidence of the matters thereinbefore mentioned, the cross bill charged that the Respondents had lately discovered, and that the fact was, that in the latter end of 1823, and in the first four months of the year 1824, divers documents were written, signed, and published, by or by the authority of his said Catholic Majesty, in which it was declared by him and by the Spanish government, that the funds which had been provided under the treaties, and particularly the overplus of *rentes* which was alleged to have then stood in the name of Don Justo de Machado, did not belong to him nor to the said government, and that neither he nor the said government had any right to dispose of the same, but the same was solely the property of private individuals; and in particular, that in 1823, official despatches were written by M. San Miguel, M. Florez Estrada, and other ministers or agents of his Catholic Majesty, to M. de Chateaubriand, and to other persons, agents, or ministers of his most Christian Majesty, in which the Spanish ministers or agents insisted that the said *rentes* being private property in the strict sense of the word, it would be contrary to the law of nations for France to interfere with the disposition of them, or to place them under sequestration in consequence of the hostile or doubtful state of relations then existing between the governments of France and Spain,

and that it was only in consequence of such representations, and from regarding the said *rentes* as private property, that the government of France abstained from confiscating them in 1823; but the French government, having reason to believe that his Catholic Majesty intended to misapply the said funds, did not mean to permit the said *rentes* to be withdrawn from their controul, and that they did not consent to the sale thereof, but that by the direction and with the privity of his Catholic Majesty, means were found to sell the said *rentes*, and to withdraw the same from the controul of the government of France, without the consent or approbation of the king or government of that country.

As additional evidence thereof, the cross bill stated, that notwithstanding that the said funds were wholly the property of private individuals, his Catholic Majesty and the assembly of the Cortes, then convened, according to the constitution of the kingdom of Spain, did duly enact, that certain *rentes* and inscriptions, and the produce thereof, including the *rentes* in the original bill mentioned, and the produce thereof, should be applied to the exigencies of the executive government, and that thereupon his Catholic Majesty and the said government of Spain, by the proper functionaries and ministers thereof, and in particular by the finance minister of the said nation and the treasurer-general thereof, did assign the whole of the said *rentes* and the produce thereof to divers persons unknown to the Respondents, by drawing bills of exchange against the said *rentes*, or by other means, whereby, if there was at any time any right or power to deal with or dispose of the said funds,

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in his Catholic Majesty or in the Spanish government, such right or power was totally lost and extinguished.

That in consequence of some of the matters therein-before mentioned, and of other matters, the Appellant had never had, or, if he ever had, he had not then, any right or interest to or in any monies which had been provided by France under all or any of the treaties therein-before mentioned, or any title to claim the possession thereof from these Respondents, or from any other person.

That by the laws of Spain, the monies in the original bill mentioned did not belong to his Catholic Majesty, nor was he entitled to sue for the same; and that so it would appear, if his Catholic Majesty would set forth in words and figures the law of Spain by which he claimed to have any interest in the said monies, or any right to sue for the same, and when such law was made, and by whom, and by what authority, and for what purpose.

That various dispatches, communications, and orders, both in writing and otherwise, had been transmitted by or by the orders and with the privity of his Catholic Majesty, and more especially by the council of his Catholic Majesty, to Justo de Machado, in which it was admitted or stated that his Catholic Majesty had no right or interest or title in or to any monies in the possession of Justo de Machado, or to the possession thereof; and so it would appear, if all communications, orders, or dispatches, made or sent to Justo de Machado, by or by the orders of, or with the privity of his Catholic Majesty, or of any of his ministers or council, were set forth.

That Count Alcudia and Count Ofalia, and one Escudero, were agents, duly authorized to act for his Catholic Majesty; and that they, as such agents, were authorized to make, and did make, to divers persons in London, statements with respect to the monies claimed by the original bill, as being in the possession of the Respondents, and to the matters in the original bill mentioned, whereby it appeared, as the fact was, that many of the allegations in the original bill contained were contrary to truth, and by which it also appeared, that if his Catholic Majesty ever had any interest in, or title to, the monies in his bill mentioned, or any part thereof, he had wholly parted (and so, in fact, he had) with such interest and right; and the said monies then by certain agreements entered into by his Catholic Majesty, or with his authority, did, as against his Catholic Majesty and all persons claiming under him, belong exclusively to certain persons having claims under a certain convention concluded in May 1823, by which his Catholic Majesty became bound to make payment and full compensation to all British subjects for property or vessels belonging to them, which had been detained, captured, or seized, by Spanish vessels or Spanish authorities, at any time after the 4th of July, 1808, down to the date of the said convention; and in particular, that a great part of the said monies did belong to the Respondents, for that the said Spanish government seized, or caused to be seized, subsequently to the 4th of July, 1808, two ships, called the Scorpion and the Vulture, with their cargoes, which belonged to these Respondents; and that the same were sold by the authority of the King of

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Spain; and that the whole of the proceeds thereof, amounting to upwards of one million of Spanish dollars, were paid into the royal treasury, and applied to the use of his said Catholic Majesty, and that these Respondents had a good and valid claim against his said Catholic Majesty, to the amount of more than 200,000*l.*, which they were prevented from enforcing against him merely by his royal character; but that they were entitled, under the aforesaid convention, to have the same paid by his said Catholic Majesty, or out of any monies belonging to him, or in or to which he had any right, interest, or title, which might at any time come into the hands of the Respondents, or under the controul of the British government, or any British court of justice.

That the Appellant, or some agent or agents acting by his authority, did, in his name, agree with an agent duly authorized by powers of attorney from the Respondents, and certain other British subjects, to pay a large sum in satisfaction of the debt so due from him to the Respondents, and similar debts owing by him to the said British subjects, which sum the Appellant had not hitherto paid.

That the British subjects, having such just claims, are very numerous, but their names are unknown to Respondents; and that the sums which they are entitled to receive or recover from or against his said Catholic Majesty, and which his said Catholic Majesty, both by contract with them and their agents respectively, and by virtue of the said convention, had agreed to discharge, and particularly the sums owing by him as aforesaid to the Respondents, were very great, as would appear if his

said Catholic Majesty would set forth the names of all the British subjects having claims under the said last-mentioned convention, and the amounts which they claimed respectively, and the sums which they were respectively entitled to receive from his said Catholic Majesty or from the government of Spain, and a schedule of all papers, documents, writings, and entries, then or at any time theretofore in the possession of his said Catholic Majesty, or of any of his agents, ministers, or servants, relating to the property of these Respondents so seized as aforesaid, or the seizure or detention thereof, or the sale thereof, or the application of the proceeds thereof, or the said convention or the agreement with his said Catholic Majesty so made with the agent of the Respondents to satisfy their said demand.

That upon a full discovery of the matters thereinbefore mentioned, it would appear that his said Catholic Majesty had no just cause of suit against the Respondents, even if it should turn out that any part of the proceeds of the *rentes* in the original bill mentioned had passed through the hands of the Respondents; and the Respondents requested him to desist from such suit, and to come to an account with them, and to pay to them the large sums which he owed to them, and which he had contracted to pay to them; but that his said Catholic Majesty refused to comply with their request, trusting that the Respondents would not be able to establish by evidence the facts in the said cross bill mentioned, the more especially as, in consequence of the absolute power of the said Appellant, these Respondents were unable and would not be allowed to examine witnesses as to

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any of the matters in the original bill mentioned, or connected therewith, in any part of his dominions, though the witnesses by whose evidence alone the truth of many of the said matters would be established were resident within his dominions.

The Respondents by their cross bill further charged, that there was a special necessity that his said Catholic Majesty should be compelled to answer upon oath all the matters therein-before mentioned, inasmuch as the same were material to their defence in the original suit, and to produce all writings, papers, and documents in any way relating to any of the matters therein mentioned, which then were in the possession of him or of any of his agents, ministers, or servants. The bill then stated a pretence on the part of his Catholic Majesty, that he had no personal knowledge of any of the matters therein-before mentioned, and, therefore, that he could give no discovery with respect to them or any of them, and that the said matters were only within the knowledge of certain of his agents, ministers, and servants, of which agents, ministers, and servants, the Respondents shewed that they were unable to procure the evidence, by reason of the absolute power of his said Catholic Majesty: and the Respondents by their cross bill farther charged, that his Catholic Majesty had knowledge, remembrance, information, or belief, with respect to all or many of the matters therein-before mentioned, and had in his possession, custody, or power, the papers, documents, and writings therein mentioned, and that he had the means of full and perfect knowledge as to the same within his power, and that he was bound to use such means in order to give the Respondents the

aforesaid discovery ; and that he ought to enquire of those who were or had been his agents, ministers, or servants, and particularly of such of them as were therein named, as to the matters therein mentioned, and as to the writings, papers, and documents therein mentioned, and that he ought to read and peruse the said writings, papers, and documents, in order that he might by his answer discover the purport thereof: and the Respondents thereby charged, that it was altogether untrue, and that his said Catholic Majesty knew and must admit it to be untrue, that the Respondents well knew or suspected, or had good reason to know or suspect, that any monies paid to or deposited with them were actually part of the proceeds of the funds received by the said Justo de Machado, by virtue of the convention of the 30th of April, in the original bill mentioned, or actually belonged in any manner to the Spanish government, and were not the proper monies of the persons by whom such monies, if paid to or deposited with them, were so paid and deposited: and the Respondents thereby further charged, that orders had been given to the boards in the original bill mentioned, or to some of the members thereof, to liquidate and allow some very small demands, but not to allow any large demands, and that such orders had been given by or with the privity of his Catholic Majesty, with a view to the names of the persons whose small claims should have been so allowed, so as to assist him in getting possession of and misapplying the monies in his said original bill mentioned, and that he had caused other means to be taken to prevent any except small and almost nominal claims from being allowed ;

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and that his said Catholic Majesty threatened and intended to proceed at law against these Respondents in respect of the matters in the said original bill mentioned, and particularly to bring an action against these Respondents in his Majesty's Court of King's Bench, for the sum of which he claims an account by his said original bill, and that he had also confederated with the said Don Justo de Machado, to serve the purpose of his said Catholic Majesty, and intended to bring in his own name actions for the recovery of the said monies.

That his said Catholic Majesty, and also the said Justo de Machado, ought to be restrained from commencing or prosecuting any such action.

That his said Catholic Majesty had not any claim or pretence of claim against the Respondents, except in respect of alleged transactions and relations subsisting between the said Don Justo de Machado and his said Catholic Majesty; but the Respondents showed, that even if his said Catholic Majesty ever had any such claim against the said Don Justo de Machado, or through him against the Respondents, yet his said Catholic Majesty had already satisfied his said demand; for the Respondents charged that the said Don Justo de Machado was possessed of or entitled to considerable property in Spain, and that lately he became, by reason of the death of his mother and other relations, entitled to additional property to a large amount, and that his said Catholic Majesty had seized, confiscated, and applied to his own use the whole or the greater part of the said property, alleging as an excuse or reason for so doing, that the said Don Justo de Machado withheld from the said Appellant monies belonging to

him the said Appellant; and by that means his said Catholic Majesty had satisfied the demands which he had or claimed to have against the said Don Justo de Machado, or through him against the Respondents; and by their said cross bill they submitted that the said Appellant was entitled to no relief against the Respondents, in respect of any transactions between him and the said Don Justo de Machado, or between them and the said Don Justo de Machado, or if he should be deemed entitled to any relief, that he must account and give credit for the whole value of the property so by him seized or confiscated, and of all the goods of the said Don Justo de Machado, which at any time had come into the hands of his agents, or of any agent or officer of the Spanish government.

They further charged, that the Appellant was indebted to the said Don Justo de Machado in various sums of money.

That the Respondents, without the discovery thereby prayed, could not set forth with accuracy, or support the claims which they had on the monies in the said original bill mentioned, or on any other monies belonging to his said Catholic Majesty.

That his said Catholic Majesty had had various communications relating to all or some of the matters therein mentioned respectively, made to him by, and by him to, divers persons, of the names respectively of Saez Aguado, Villa Hermaso, Recacha Colomarde, Balbon Longa, Uriarte Heredia, Ofalia Alcudia, San Miguel, and Florez Estrada; and that divers writings touching the said matters, or some of them, had with his privity, or by his

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order, and on his behalf, been sent and received to or by the said persons respectively, or had been sent by the said persons to him, and that the true purport and effect of all the communications therein-before mentioned should be set forth, and that all the said papers should be produced.

That his said Catholic Majesty alleged, that the said Don Justo de Machado had, and in fact the said Don Justo de Machado claimed, some interest in the said matters, and a great or some part of the monies in the said original bill mentioned belonged to him, and had been admitted by his said Catholic Majesty to belong absolutely to him.

That his said Catholic Majesty had then, or lately, or at some time had in his possession, custody, or power, or in the possession, custody, or power of his agents, ministers, or servants, or some of them, divers books of account or book of account, cash books or cash book, memorandum books or memorandum book, diaries or diary, journals or journal, letter books or letter book, and other books, deed or deeds, agreements or agreement, copies or copy of agreement, despatches or despatch, copies of despatches or of despatch, orders or order, decrees or decree, minutes or minute, copies or copy of orders or copy of order, copies of decrees or copy of decree, notices of claims or notice of claim, memoranda or memorandum, entries or entry, and particularly entries relating to the capture and seizure of vessels, letters or letter, copies of letters or copy of letter, abstract or abstracts, extracts or extract, copies or copy, and other papers and writings, relating to or shewing the truth of all or some of the matters therein-before mentioned, which his said

Catholic Majesty refused to produce, though his said Catholic Majesty well knew, as the fact was, that without the production of the said papers, and the discovery of all the matters by the said cross bill enquired after, the Respondents could not have justice in the said original suit; the more especially as his said Catholic Majesty intended to amend his said original bill, and materially to alter the case stated in it, which these Respondents submitted he ought not to be allowed to do till he should have fully answered their said cross bill, the discovery thereby prayed being such, as, besides being essential to these Respondents' defence to the said original bill, would shew the untruth of the allegations which the said Appellant intended to introduce by amendment into his said original bill.

The prayer of the cross bill was, that the Appellant might be ordered to make to the Respondents the discovery thereby sought, and that it might be declared that the Appellant was not entitled as against the Respondents to any account of the monies in his said original bill mentioned, or of any other monies being part of the proceeds of the *rentes* in the said original bill mentioned, but that if any account should be directed of the said monies, then that an account might be taken of what was due to the Respondents, or to the said Don Justo de Machado, in respect of the transactions and matters therein-before mentioned; and that his said Catholic Majesty might in such account be charged with all monies and property belonging to the Respondents, or the said Don Justo de Machado, which had been seized, detained; or confiscated by or by the orders of his said Catholic Majesty, or the Spanish government, or the

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agents and officers of the Spanish government ; and that his said Catholic Majesty might be ordered to pay to the Respondents what should be found due to them, and that they might have the benefit of the whole which should be found due from his said Catholic Majesty by way of set-off, or in the nature of a set-off, or counter claim against his said Catholic Majesty ; and that his said Catholic Majesty and his agents might be restrained from commencing any action at law against the Respondents, or either of them, in respect of any of the matters in the said original bill, or therein mentioned ; and that his said Catholic Majesty might also be restrained from proceeding in the said original suit until he should have granted a full discovery of all the matters of which a discovery was thereby prayed, and of all the writings, papers, and documents therein mentioned, and for further relief.

On the 11th of July, 1828, the Respondents put in to the Appellant's original bill an answer, which was to the same effect as the cross bill.

On the 30th of July, 1829, the Appellant appeared to the cross bill. On the 30th of January, 1830, the Appellant obtained an order of course to amend.

On the 4th of February, 1830, the Respondents moved to discharge this order for irregularity, on the ground that it had not been obtained within six weeks after the answer of the only persons who were effectually made defendants was to be deemed sufficient. The Vice-Chancellor discharged the order as irregular. But as it afterwards appeared that the Defendants had accepted the 20s. costs, this was held a waiver of the irregularity of the order to amend, and on that ground the

Vice-Chancellor discharged the order of the 4th of February.

By the amended bill Achilles de Pereira was made a co-defendant. On the 13th of March, 1830, the Respondents appeared to the amended bill.

On the 9th of May an order was made upon motion in both causes, that the Respondents should have a month's time to plead, answer, or demur to the Appellant's amended bill, after the Appellant should have answered the cross bill of the Respondents. This order was drawn up as on the 8th of May, 1830, and was affirmed by the Lord Chancellor, on appeal, by order dated the 6th of July, 1830.

On the 15th of January, 1831, notice was served on the clerk in Court of the Respondents, that on the 20th of January the Court would be moved, before the Lord Chancellor, on behalf of the Appellant, that Don Juan Escudero, residing at No. 30. Weymouth Street, Portland Place, in the county of Middlesex, might be permitted, on the behalf and in the name of his Majesty the Appellant, to put in an answer to the Respondents' cross bill; his Catholic Majesty thereby undertaking that the answer so to be put in, and all proceedings in the said causes consequent upon it, should be as valid and effectual for the purposes of the said causes, in such manner as the Court should direct, as if such answer had been put in personally by his Majesty in the ordinary course; or that the Court would be pleased, under the peculiar circumstances of the case, to accept the answer of his Majesty, without oath or signature; or to make such other order therein as to the Court might seem fit.

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In support of this application an affidavit was, on the 18th of January, 1830, filed by Juan Escudero. He thereby stated, among other things :—

That he was a native of Spain, and one of the liege subjects of his Catholic Majesty the King of Spain ; and was a secretary honorary to his Majesty ; and that he had been duly appointed by his said Catholic Majesty, and by the board in the pleadings of the first above-mentioned cause, called the Board of Examination and Liquidation of Claims, commissioner in this country for the purpose of recovering payment of the proceeds of the indemnity funds in the pleadings in those causes mentioned from the above-named Defendants, in the first above-mentioned suit, and the other persons, in whose possession the same then were, and for the purpose of finally adjusting, arranging, and settling all accounts, and other matters then in dispute, relative to said funds ; and that deponent then was, and had been ever since the month of March, 1827, actually engaged in the duties of his said office.

That he was, and had, ever since the year 1824, by appointment of his Catholic Majesty, been secretary to the board in the pleadings in those causes named, called the Board of Examination and Liquidation ; and that in the month of March, 1827, deponent and Don Mateo de la Serna were, by a power of attorney, duly executed, jointly and severally appointed the attorneys and attorney of his said Catholic Majesty, and the said board, in this country, for the purpose of recovering the said indemnity funds from the present holders thereof, and finally adjusting and settling all accounts relative thereto.

That the said Don Mateo de la Serna then was, and had, ever since the month of March, 1829, been resident in Madrid, where he held a situation of high trust and confidence under his said Catholic Majesty, in consequence whereof deponent had, ever since the said month of March, 1829, alone acted under the said power of attorney.

That he, deponent, had then intrusted to his charge the sole superintendence, conduct, and management in this country, of the proceedings in the above causes on behalf of his said Majesty, as such commissioner, agent, or attorney of his Catholic Majesty and the said board as aforesaid, and that he is in constant communication with the ministers of his said Catholic Majesty, and with the said board, relative to the matters in these causes as such commissioner, agent, or attorney as aforesaid.

That when the answer of the Respondents was put in to the original bill of complaint of His Catholic Majesty in the first above-mentioned suit, he laid the same before counsel to advise thereon, and the further proceedings to be taken in that suit, on behalf of his Catholic Majesty, and that deponent was advised by counsel, that in consequence of the statements contained in the answer, and the manner in which the Defendants had attempted to shape their defence, and thereby elude the claims of his said Catholic Majesty in that suit, it would be necessary to make several material alterations and amendments in the said bill, and to introduce therein several new facts, with a view to meet the defence set up by the said answer, and to obtain a further discovery from the Respond-

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ents, and upon the many important matters in issue in that suit.

That it was thought advisable, before proceeding to amend the said bill, to institute various enquiries, both in France and Spain, on behalf of his Catholic Majesty, in order to procure further information relative to the matters in issue in that cause, and which was done accordingly ; and that, owing to the great length and importance of the said amendments, and the many enquiries so previously instituted, both in France and Spain, as aforesaid, for the purpose of obtaining further and more accurate information as to the real facts and merits of this case, the said amended bill was not finally settled until the month of January.

That he believed that his Catholic Majesty had personally little or no knowledge of the matters in the said cross bill, inasmuch as the transactions stated in the said bill referred to acts done by the government of Spain, and not to acts done by his Catholic Majesty personally, and in his individual character.

That, believing it would be impossible to procure an answer to the said cross bill from his Catholic Majesty personally, (inasmuch as deponent conceived it would be, and he had been instructed by authority that it would be, considered both by his Majesty and the Spanish government beneath the rank and dignity of his Catholic Majesty, as a sovereign prince, to put in an answer personally and upon oath in this court, or in any of the courts or tribunals of this or any other country,) he, the deponent, in consequence of an order made by the Lord Chancellor as thereinbefore mentioned, had a consultation with counsel

to receive their opinion as to what course, under all circumstances, it would be expedient for his Majesty to pursue, in order to overcome the difficulties which had been thus interposed to the further prosecution of the said first above-mentioned suit.

The deponent then, after mentioning the advice given by counsel, stated that his Catholic Majesty had authorized him to make the application which was then pending, to put in an answer in his Majesty's name, and to consent that all proceedings consequent thereupon should be as binding as if an answer had been filed in the usual form. Then, after stating his own belief or opinion as to some matters, he concluded by stating, that he believed that no discovery or information which his Catholic Majesty personally could give to the matters contained in the said cross bill would be of any benefit to the Respondents in their said suit, and that, from the knowledge he the said deponent possessed as to the several matters contained in the said cross bill, he the said deponent had no doubt whatever but that he could give a full answer and discovery unto all the matters therein contained.

This motion was argued before the Lord Chancellor, on the 4th day of March, 1831. On the 10th of September, 1831, a notice was served on the Respondents that the Lord Chancellor would be moved on behalf of his Catholic Majesty, the King of Spain, that the order of the Vice-Chancellor, made in the said causes, on the 8th day of May, 1830, might be discharged, and also that, at the same time, the motion then pending for taking the answer of his Catholic Majesty the King of

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Spain by deputation, would be further heard by his Lordship.

On the 15th of November, 1831, Thomas Browning, the solicitor of the Appellant, filed an affidavit, charging collusion between the Respondents and one Mendizabal, in a suit *Mendizabal v. Machado*, for the purpose of preventing the funds in question being brought into court.

On the 17th of November, 1831, the Respondents filed seven exceptions to this affidavit for impertinence; complaining, by the first exception, that the whole affidavit was impertinent; and by the other six exceptions, that, at least, certain parts of it, respectively specified in the several exceptions, were impertinent. The exceptions were referred to Master Trower, who, on the 28th of November, 1831, certified that the whole of the affidavit was impertinent. To this report the Appellant filed exceptions on the 9th of February, 1832, which by order were disallowed.

On the 16th and 17th days of April, 1832, the motions, of which the notices bore date respectively the 13th of January and 10th of September, 1831, were brought on by the counsel for the Appellant. On the 14th of May, 1832, an order was made on the said motions, by which it was declared that the Lord Chancellor did not think fit to make any order upon the said notices of motion, and did not think fit to give any costs of the said motions to either of the parties.

His Lordship at the same time ordered that the Appellant should pay to these Respondents the costs of the exceptions to the Master's report, which had been reserved when the exceptions were disallowed; and an order, dated the 14th of May,

1832, was then drawn up, disallowing the exceptions with costs, and directing payment of the deposit to the Respondents in part of their costs.

The King of Spain presented his appeal in these causes, and by his appeal prayed that the order of the Vice-Chancellor, bearing date the 8th of May, 1830; the order of the Lord Chancellor, bearing date the 6th day of July, 1830; the report of Master Trower, bearing date the 28th of November, 1831; the order of the Court of Chancery, bearing date the 15th of March, 1832; and, the several orders of the Lord Chancellor, bearing date the 14th day of May, 1832, might be reversed.

For the Appellant, *The Attorney-General* and *Sir Charles Wetherell*.

The Appellant, in this case, sued as a sovereign prince. His right to do so was questioned by a demurrer to his bill—his right to sue in that character was established by original decree and upon appeal. This device having failed, the Defendants have now resorted to a new scheme by filing a cross bill, and requiring from the Plaintiff an answer upon oath, as if it were a case of ordinary practice. But no precedent is to be found of a foreign potentate having answered upon oath. The case has never arisen, and the practice is now upon the first instance to be settled. In the absence of authority, resort must be had to analogy, which is furnished by the cases of peers, infants, lunatics, persons in a state of imbecility, and corporations. If a peer is sued, the plaintiff must be content with an answer upon honour. In all the other instances, the answer is put in by some person on behalf of the defendant. In the case of a corporation, the answer is commonly by

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the secretary or clerk. That is the nearest analogy to this case. A sovereign cannot answer upon oath, and it is fit that he should answer by deputy.

The Lord Chancellor. — It may be fit that the law should be so: but if the Court of Chancery should so order, would it not be making a new law, and usurping the authority of the legislature?

For the Appellant. — The Court has inherent power to establish such a rule as a matter of practice; otherwise it would be in vain that parties are permitted to sue as sovereigns, since their remedy might always be defeated by the device of a pretended cross bill, to which the original defendant knows they could not answer upon oath.

The Lord Chancellor. — On the other hand, in a meritorious case, an individual might have to contend with a sovereign prince at fearful odds.

For the Appellant. — It is a question of practice, not of law. It is the first case of a bill filed against a sovereign prince. The Court has to establish a rule. If the ordinary rule of an oath is required from the sovereign himself, the ends of justice will be defeated. He ought, by some practice now to be established, to be enabled to answer, if an answer to such a bill is requisite. This pretended cross bill is filed just before the answer to the original bill. That answer suggests that Pereira is a necessary party, for the very purpose of creating the necessity to amend the original bill. But, in truth, this is not a cross bill which must be confined to the same subject matter, and be filed against the same par-

ties. The original bill was by a sovereign, a foreign corporation sole. It was decided upon the demurrer that it was the bill of the King of Spain, and not of an individual. The cross bill treats him as an individual, not as a sovereign.

Lord Plunkett. — That objection should have been urged by way of demurrer to the bill.

The Lord Chancellor. — In the discussion of the case upon the former appeal, it seems to have been taken for granted by the House, that the King of Spain, suing in the courts of England, must be subject to the practice of the courts like any other individual. The Lord Chancellor says *, “If a sovereign appears as a plaintiff, “the Court can impose any terms: you have “him in your power: you may file a cross bill, “and then you have him completely under “your control and jurisdiction.” Lord Redesdale, in giving judgment, makes no observation to impeach that *dictum* of the Lord Chancellor, and he was familiarly versed in these questions, as appears by cases in print.

For the Appellant. — This pretended cross bill raises a new case upon a question of lien, in respect of captures of British ships. Neither the person nor the subject-matter is the same as in the original bill. This is not a cross bill in substance or form, and if it is defective merely in form, the House, in such a case, will hold the parties strictly to form. A demurrer is prevented by a few words thrown in for the purpose, and advantage may be taken of the defect

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without demurrer. But, admitting for argument that it is a cross bill, the rule of practice, which requires an answer upon oath, is the creature of the Court, and may be moulded to meet the purposes of justice. Why does a peer answer upon honour? There is no statute upon the subject. It is the mere practice and courtesy of the Court. The law of nations requires that the same practice of courtesy should be extended to foreign sovereigns. As there is no practice, the King of Spain might be treated as a corporation, and put in his answer by deputy.

The Lord Chancellor. — Can you give any instance of a foreign corporation aggregate, or domestic corporation sole, being permitted to answer without oath? This is the case of a foreign corporation sole.

For the Appellants. — It is a case of anomaly. The rule and practice to be applied to it must be new. A commoner becoming a peer is not required to answer upon oath, and in the case of foreigners not being Christians, an oath in the form required from English subjects, is not exacted, even where they are produced as witnesses. Oaths have not been required from Quakers, Moravians, and Hindoos.*

The Lord Chancellor. — The courts determine what shall be considered as an oath. They do not dispense with the obligation of an oath or solemnity binding upon the conscience, but they determine what the form shall be to have that

* See *Acheson v. Everett*, Cowper, 389. Stra. 1104. 1 Wils. 84.

effect, as in *Omichund v. Barker*.^{*} Would the King of Spain submit to any ceremonial equivalent to an oath?

For the Appellant.—According to international law, a sovereign cannot take an oath. Who is to administer it?

By the House.—Where is it decided that a sovereign cannot take an oath? The King of England takes a coronation oath.

For the Appellant.—This is a question of practice, and the Court may provide for the difficulty, as they did in cases of imbecility, by appointing a substitute to answer, controlling their own practice. The law as to fines and recoveries is the mere practice of the Common Pleas. The order of 1640 was made upon this principle. The cases where answers have been put in without oath, are numerous.† We propose to give answer to the enquiries of the cross bill, by a person better acquainted with the matters of enquiry than the King of Spain. His oath will be of no service to the Respondents, to enable them to answer the original bill.

The Lord Chancellor.—A case may be supposed of facts, as to which discovery is sought by the bill, and which might rest in the sole knowledge of the King of Spain.

For the Appellant.—That objection would apply to some of the other cases, where the oath is not required from the Defendant. The disclosure may be made more effectually by his substitute, as to all the discovery required. So it is sworn in the affidavit filed. If the House,

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† Sec Rcd. Treat. 103.

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having permitted the King of Spain to sue his agent here, to recover funds in his hands, will not permit him to answer in the only mode within his power, and according to the analogy of similar cases, he will be deprived of his right, and there is a defect of justice.

For the Respondents, *Sir Edward Sugden* and *Mr. Russell*.

The bill in this case was amended by a trick of practice. The Respondents had inadvertently accepted costs, and under the authority of *Tarleton v. Dyer* *, the Lord Chancellor felt himself bound to confirm the order for amendment. But for this trick the Appellants could never have had any answer to any other than the original bill. It is argued that this is not a cross bill; but any bill which converts the defendant's case into a bill against the plaintiff is a cross bill, and it may seek relief as well as discovery. The obligation to answer it does not depend on the matter of the bill. If it contains no equity, and is not a cross bill, it should seem the subject of demurrer. It is too late now to raise a question before the hearing whether the bill can be sustained. The question now is, whether the cross bill must be answered according to the practice of the court, not whether relief can be had upon the original or the cross bill. It is supposed that the King of Spain cannot take an oath. In his own dominions and before his own tribunals there is no person who can administer an oath to him: but if the King of Spain makes himself a suitor before a foreign tribunal, he submits himself to the laws of the foreign country in which he becomes a suitor, and must

* 1 Russ. & Mylne, l. 486.

do justice as he receives it, in the character of a suitor. The law of nations is foreign to the question: no authority from that code is producible upon the subject. How will the King of Spain be degraded by doing the justice which he demands? The rule with respect to foreign sovereigns is laid down in *Colvin's case**: "If

" comes into a country, he
" must sue and be sued by the name of a king." If he is not perfectly described in the bill, it is the subject of demurrer. There may be rights which are not the subject of suit, but of treaty. In the case of the *Colombian Government v. Rothschild*†, the Vice-Chancellor asked who the *Colombian* government were, and how they were to be subject to the condition of ordinary defendants? This proceeded on the principle for which we now contend, that they might be subject to a cross bill; and the demurrer was allowed, because they were not so described that process in case of a cross bill could be served upon them.

If a foreign sovereign sues, he must so describe himself that a cross bill may be filed against him. This appears from what is said by the Lord Chancellor in the former appeal in this case.‡ The case of ambassadors is not in point.

Lord Wynford. — An ambassador is exempt by a special law. But if an ambassador volunteers to be a suitor, the defendant in the suit ought not to be deprived of his powers of defence.

For the Respondent. — The cases put do not bear upon the question. The King of Spain is not in a state of imbecility, nor under the incapacity

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* 7 Co.

† 1 Sim. 94

‡ 2 Bligh, N. S. 58.

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of infancy or coverture. He is not a corporation aggregate, and has not the privilege of a peer. He is not within the analogy of the cases, nor does he fall within the principle.

As to the order of 1640, it has never been enforced. The practice arises out of another order, that the masters should not swear, &c.

In the case of a corporation aggregate, the Court does not point out who is to be the party; but the plaintiff makes the officer a party who has the custody of the documents.

In the course of the argument the following observations were made.

Lord Wynford. — There was a case in which a reference was made to the twelve Judges, in which the question was, whether a German prince could sue in the courts of this country? and it was held that he was a duke by courtesy in this country.

The Lord Chancellor. — A foreign sovereign is not sued here by a petition of right, nor does he sue by his attorney-general or government officer, but as a private individual.

Is there any instance in which a Court has permitted a party coming to sue here as the *locus contractus*, to import the practice or mode of proceeding of a foreign court, or assert the privileges belonging to the party in a foreign country. There is one case in the Common Pleas where they ordered the Duke of Fitzjames to be discharged on filing common bail. But *Heath J.* dissented, and Lord *Ellenborough* disapproved of the decision. The right of the King of Spain in respect of privilege in the courts of England, is not greater than that of any of his subjects. If he can bring

his privilege with him, why may not his subjects also? One objects to answer upon oath; another may object to a trial by a jury of tradesmen. But if the king is recognized in the character of a suitor, must he not be content with the common fare of the court.

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At the conclusion of the argument, Lord *Plunkett* moved that the judgment might be affirmed, observing only, that as there had been three decisions, by the highest authorities in the law, upon the questions raised in the appeal, he did not deem it necessary to assign any reasons.

The Lord Chancellor.—I entertained no doubt upon this question when it was first argued before me in the Court of Chancery, and further consideration has confirmed my original opinion. The more the question is discussed the more clear it appears. The King of Spain sues here by his title of sovereign, and so he must be sued, if at all. But, beyond the mere name of sovereign, it has no effect. He brings with him no privileges which exempt him from the common fare of other suitors. The practice of the Court is part of the law of the Court. If any case could have been produced, shewing that the Court in such a case had deviated from their practice, I might have felt bound by such a precedent, as a law of practice laid down for my guidance. The decision upon the former appeal did not dispose of this question; but it is impossible to read the observations of the Lord Chancellor and Lord Redesdale upon the former appeal*, without being con-

* *Ante*, Vol. II. p. 47.

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vinced, that, if this question had been submitted to them, they would have disposed of it in the same way as the Court below. The very case now under discussion, and then contemplated, was part of the ground on which Lord Lyndhurst disposed of that appeal. The same principle of decision is to be found in the judgment of the Vice-Chancellor in the case of the *Colombian Government v. Rothschild*. I am authorized by Lord Wynford to state that he concurs in this judgment.

Judgment affirmed, with costs not exceeding 200*l*.

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(COURT OF CHANCERY.)

WILLIAM NICOL, the Administrator
of the Goods, Chattels, and Credits
of GEORGE NICOL, deceased - - } *Appellant* ;

SIR ROBERT WILLIAMS VAUGHAN, }
and Others - - - - } *Respondents.*

Under a decree for the administration of assets, N. as a creditor, having made a claim upon a bond for 12,000*l.* ; upon which issues were directed to be tried by the court, whether as to any and what part the bond was given for services, or as a loan, or whether it was a bond of indemnity as to 10,000*l.*, or a gift. The House of Lords, on appeal, reversed the order directing the issues, and remitted the cause, to decide upon the facts in evidence before the Court below ; whereupon the Court declared that the bond as to 10,000*l.* was a counter security, &c. This decree having been reversed on appeal, an order was made in the Court below, on petition of parties in the cause interested in the assets, that they might be at liberty to file a bill to impeach the validity of the bond as a gift. Upon appeal against this order it was reversed, chiefly on the ground that the parties had opportunity to raise the same question on the former proceedings, which they had neglected, and that no other or farther evidence was to be expected than that which was already before the court.

IN this cause there had been two preceding appeals : the first against the order of the Master of the Rolls, directing issues (reported *antè*, Vol.

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V. p. 505.); the second against the decree of the Master of the Rolls, declaring the bond given to the Appellant by the Ladies E. and M. Ker, to the extent of 10,000*l.* (part of the 12,000*l.* secured), was intended as a counter-security for the engagement into which he had entered as surety for them, &c. (Reported *antè*, Vol. VI. p. 104.)

George Nicol had taken proceedings in the Court of Session in Scotland against the Respondent, and George, Earl of Winchelsea and Nottingham, and also against the heirs at law of Lady Mary Ker and Lady Essex Ker, to obtain payment of the money claimed to be due to him in respect of the bond, out of the produce of the real estates in Scotland, of which Lady Mary Ker and Lady Essex Ker had died seised, and obtained in such court a decree, &c.; but by an order of the Court of Session in Scotland, a sum of money was set apart, and, under decree of the same court, had been deposited and remained in the Royal Bank of Scotland, to answer and pay, and as a security for the amount of the principal and interest claimed by George Nicol in his lifetime, and by William Nicol since his decease, on the bond of the 15th of July, 1815, for 12,000*l.*

The Respondent, Sir Robert Williams Vaughan, on the 18th of December, 1832, presented his petition to the Master of the Rolls, praying that he might be authorised and directed to institute a suit in the Court of Chancery, for the purpose of impeaching the validity of the bond for 12,000*l.*, given by Lady Essex Ker and Lady Mary Ker, to George Nicol, deceased; and that the sum set apart by the order of the Court of Session, to

cover the amount due thereon for principal, interest and costs, might remain set apart, and secured, to abide the event of such proposed suit, and that in the meantime William Nicol might be restrained by the order and injunction of the Court from receiving the sum so set apart and secured, or any part thereof.

On the 29th of January, 1833, William Nicol presented his petition to the Master of the Rolls, praying that it might be referred to the Master to compute what was due to him for interest on the bond for 12,000*l.* to the date of his report, to be made in pursuance of that application, and that the same, together with the principal sum of 12,000*l.*, secured by the bond, might be paid to him by the Respondent, Sir Robert Williams Vaughan, or otherwise that he might be at liberty to take such proceedings as he might be advised for recovering the principal monies, and interest out of the monies remaining in the Royal Bank of Scotland. And that it might be referred to the Master to tax his costs of that application and relating thereto, and that the same might be paid to him by the Respondent, Sir Robert Williams Vaughan; or that he might be declared entitled to receive the same out of the monies so remaining in the Royal Bank of Scotland, or to take such proceedings for the recovery thereof as he might be advised.

The two petitions came on to be heard together before the Master of the Rolls, on the 14th of February, 1833, when his Honour ordered on both petitions that the Respondent, Sir Robert Williams Vaughan, should be at liberty to institute a suit in the Court of Chancery, for the purpose of ques-

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tioning the validity of the bond for 12,000*l.*, given by the Lady Essex Ker and Lady Mary Ker to George Nicol, deceased, taking it to be a bond intended as a bounty or gift to George Nicol. And it was ordered that William Nicol, the administrator of George Nicol, be restrained by the order and injunction of that court, from receiving the sum set apart by the order of the Court of Session in Scotland; to cover the amount claimed to be due on the bond, for principal and interest, and costs. And it was ordered that the petition of William Nicol should stand over in the meantime.

Against this order William Nicol appealed to the House of Lords.

For the Appellant —

Under the order of the Court of Chancery of the 28th of April, 1827, the Master was at liberty to inquire into all the circumstances relating to the bond for 12,000*l.*, and the Master did not by his report made in pursuance of that order find, nor did any of the parties at that time suggest, that the validity of the bond was questionable on the ground which is now for the first time raised. The tendency, if not the direct effect, of the order appealed from, is to impugn the orders already made by the House of Lords, and is a departure from the principle of all the former proceedings relating to the bond. The order of the Court of Chancery of the 28th April, 1827, whereby it was ordered that the Master should be at liberty to inquire into the consideration and all the circumstances relating to the bond for 12,000*l.*, and that George Nicol should be at liberty to exhibit interrogatories for his own examination, was made by consent of all parties, and in fact could not have

been made except by consent. The object of this consent order was to enable the Court to decide the question in dispute respecting the bond, without the expense and delay attendant on a suit in equity.

The order of the Master of the Rolls of the 29th of June, 1829, whereby he directed that issues should be tried at law respecting the consideration of the bond, was appealed from by the Appellant upon grounds which equally apply to the present case, namely, because it was a departure from the principle of the consent order of the 28th April, 1827, and was moreover unnecessary, inasmuch as it is not pretended that there is any person in existence who can give additional evidence respecting the bond. The House of Lords, on that appeal, adopted the Appellant's views, and upon that principle, by an order of the 14th October, 1831, reversed the order of the Master of the Rolls directing the issues.

The order now appealed from is open to the same objections (amongst others) which prevailed against the order of the 29th June, 1829, and cannot be right, unless the order of the House of Lords, reversing the directions for the issues, was wrong. And the Appellant cannot but feel aggrieved that he should be subject to the ruinous charge of litigating, in a new, dilatory, and expensive form of proceeding, a question, every part of which was fully before the court below. The order has been made for the purpose of enabling the Respondents to question the validity of the bond, upon grounds which are now open to litigation.

The Respondents originally contended before

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the Master that the bond for 12,000*l.* was a bond of indemnity, and made no other objection to it. The Master, by his report of the 21st of May, 1828, found that the bond was not a bond of indemnity, but was a voluntary bond, given without any consideration; and the order of the House of Lords of the 23d of July, 1832, ordered that the Master's said report of the 21st of March, 1828, should be absolutely confirmed. That point, therefore, is now concluded.

A second and different objection is now made to the bond. It is now said, that, admitting the bond to be voluntary, it is impeachable in equity, on account of the relation in which George Nicol stood to the Ladies Ker. Now, in the interval between the order of the House of Lords of the 14th of October, 1831, which reversed the order of the Master of the Rolls, directing the issues, and the order of the 23d of July, 1832, confirming the Master's finding that the bond was a voluntary bond, the Respondents had a full opportunity of making this second objection, supposing them not to have been even at that time precluded from raising it by the previous proceedings before the Master. That all the facts were then before the court below is established by the proceedings.

The Appellant's petition, which was presented after the order of the House of Lords of the 14th of October, 1831, was confined to a prayer for confirming the Master's report, and did not go on to pray for payment of the money, simply because it was perfectly known to all parties that the money was in Scotland, awaiting only the determination of the question then before the Court, and ready to be paid to the Appellant the instant that ques-

tion was decided. That was the time at which the Respondents might have presented their petition to the Master of the Rolls, praying that if the bond were held to be voluntary (as your Lordships have since determined it to be) their second objection to the bond might be heard and determined. The Respondents did not think proper to take that course. They had, in fact, at all times previously relied upon a single and different ground of defence.

Where, as in the present case, a party relies upon two distinct defences, and all the facts necessary to raise and to enable the Court to determine both grounds of defence are before it, such party cannot be permitted first to abandon one of his defences, and carry his opponent through a long and expensive course of litigation confined to the other, and when his case fails him upon the ground he has selected, to re-assume the defence he had abandoned, and in effect commence an entirely new course of litigation. The ruinous expense already incurred by the Appellant in litigating the questions in the case, is itself a consideration deeply affecting the justice of the case.

For the Respondents,—

The bond for 12,000*l.* from the Ladies Ker to Mr. Nicol, appears to have been made under circumstances which would induce a Court of Equity to set it aside, upon the principles which are universally applied to gifts to persons standing in a relation of trust or confidence towards the donor.

There is, at all events, so much suspicion as to the circumstances under which the gift was made, as to render it fit that further investigation should be had.

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The controversy between the parties hitherto has been, whether the bond was to be considered a voluntary bond or a bond of indemnity, and until it was established not to be a bond of indemnity, but a voluntary bond, it would have been premature, and, in fact, impracticable, to discuss its validity considered as a gift.

For the Appellants, Sir *Edward Sugden* and Mr. *Tinney*.

For the Respondents, Mr. *Pemberton* and Mr. *Hope*.

The Lord Chancellor.—In October, 1831, the House reversed an order of his Honour directing three issues to be tried, and on the ground that the evidence was all before the Court, and that the Court could then dispose of the question, whether or not the bond was an indemnity or counter-security. The Master of the Rolls then considered that question, and came to the conclusion that as to 10,000*l.* the bond was a counter-security, and as to 2,000*l.* it was a voluntary gift in remuneration of services. The House of Lords, in July, 1832, reversed the declaration as to the counter-security, and confirmed the Master's report absolutely, finding that the whole bond was voluntary, and a gift and bounty from the obligors to the obligee.

After this decision both parties petitioned; one (the Respondents) for leave to institute a suit to impeach the validity of the bond considered as voluntary and a gift, and for an injunction to restrain the Appellant from receiving any part of the money set apart in Scotland for the payment of it; the other (the Appellant), for computation of in-

terest due on the bond, and to have that, with the principal, paid out of the Scotch fund.

On both petitions the order appealed from was made. It gave the Respondents the leave they asked to impeach the bond in a new suit, taking it to be bounty or gift; and it ordered the Appellant's petition to stand over, in the meantime restraining him from receiving the money.

That the Court below had the power to make this order there cannot be any doubt; it was in the discretion of the Court, but a discretion to be exercised soundly; and the question is, whether or not, in the circumstances of the case, that discretion ought to have been exercised as to granting the leave—in other words, whether your Lordships, having before you the case which was before the Court below, would have given the leave; and I am of opinion that you would not, and ought not to have given it.

The case set up against the bond for the first time is, that, from the relation subsisting between the parties, a Court of Equity would not suffer the obligee to take advantage of the obligor's bounty. Now this case might have been made in all the former stages of the long litigation, to the end of which it may be hoped that we are now approaching.


The objection, now first relied on, is one which was open to the Respondents from the beginning; and it would have decided the cause in their favour, whether the rest of the case had been with them or against them.

They then relied upon the different ground of which the decisions of this house has deprived them—that the bond was a counter-security. But if

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the bond was good for nothing as a gift, they ought to have urged that alternative, and said, “Whether it be indemnity or bounty makes no difference; for if indemnity — *cadit questio*; and “if bounty, it cannot be supported in a Court of Equity, regard being had to the circumstances.”

A party cannot be allowed to bring forward his case piece-meal; and, after exhausting his adversary with litigation on one ground, to drag him through a second course of proceeding upon another, of which he might at first have availed himself.

Then was there anything in the proceedings, whether in the conduct of the Appellants or in the orders of the Court, which misled the Respondents, and prevented them from taking earlier the objection on which they now rest their case? I am very clearly of opinion that the more the whole proceedings are attended to, the more plainly will it appear that the Respondents have no such matter to urge. If the contention had always been on the one side, that the bond was indemnity, and on the other, that it was for a valuable consideration, and if nothing had been done, either by the parties or the Court, to direct attention to the bond considered as voluntary and bounty, there might be some ground for the application of the Respondent to be let in with a new case referable to the bond as voluntary bounty. But that is not the fact; it is the reverse of the fact.

First, the Master’s report, in March, 1828, while it negatives the bond as “indemnity,” distinctly finds that it was voluntary, and given as a bounty.

Secondly, the Respondents excepted to that finding, on the ground that the bond was not

voluntary, but indemnity. And this exception of course proceeded upon the assumption that it was not only not voluntary, but also not given for value.

Thirdly, the Appellant took an exception to the finding of voluntary, maintaining that it was for value; but he desired leave to withdraw that exception; and although this was refused, he thereby gave sufficient intimation to his adversary that he was satisfied to rely on the bond as a gift, provided it were found not to be counter-security.

Fourthly, the frame of the issues then (29th June 1829) directed most distinctly called the attention of the Respondents to the materiality of their present objection; for one was to try the question “given for value or not;” another to try the question “indemnity or not;” and the third to try the question “bounty or not.”

It cannot, surely, be contended that they ought not to have been prepared for the event, had the issues been tried, of the first being found against the Appellant, the second and third in his favour; that is, the whole matter being found as it is now placed by the decision of this house, confirming the Master’s report, and establishing the bond as voluntary and gift.

But although this house, in 1831, reversed the order directing the issues, it also gave the Appellant the leave which had been refused below, of withdrawing his exception. This is very material; for it places the case in October, 1831, exactly as it would have been if no exception had been taken by the Appellant, on the ground of the bond being for value, and leaves the parties contending thus: the one, that it was indemnity; the other, that it

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was bounty; and, therefore, it is manifest that there was no third or middle term; nothing to be considered but those two alternatives; that the only question now was between indemnity and bounty; and that if it should be found not to be indemnity, it must be bounty. Then surely the Respondents should have gone back to the Court below, prepared to meet the second alternative, in case his Honour should be of opinion that there was no evidence to shew indemnity; for in that case it must be bounty: and then their present contention became material — nay, decisive. In a word, they had a plain course to take when they went back. They were to maintain, first, that the bond was a counter-security, and not a gift; but next, if they should fail in that, they had to state that it was impeachable in equity, on account of the circumstances now urged. That would have rendered it immaterial how the first question was decided; for either way they must prevail.

The reference made to the Master, in April, 1828, it must be first observed, was by consent of all parties; nor indeed without such consent could the examinations, which formed part of the order, have been directed. The object apparently was, to avoid a tedious litigation, and to bring on at once the investigation of all the circumstances; and it expressly gave the Master authority to “inquire into the consideration, and *all the circumstances* relative to the bond.” Under that order there was not one of the matters now alleged, into which the Master might not have inquired, and the Respondents could have then raised the whole of their present objection.

They might afterwards, when they knew that the

Master had found the bond not to be a counter-security, but a gift, have petitioned the Court, and raised their objection, praying to have the circumstances in which the bond was granted inquired into, if the Court should confirm the report, finding it was gift and not indemnity, and contending that, although a gift, it was impeachable. The only objection that could have been made then to such further inquiry, viz., that they might have taken the same ground earlier, applies with tenfold force now.

It is suggested that the Appellant may, by a bill being filed against him, be compelled to disclose something within his knowledge relative to the bond, something which he may have heard from his father. This is not very likely, considering that the father himself has been examined fully. But supposing the Appellant to know something material against his own claims, he might have been examined upon interrogatories, had the Respondents chosen to take their present objection at the right time.

Upon the whole, I can see no reason for a new suit being now commenced, in order to give them the opportunity of doing what they had abundant opportunities of doing before—bringing forward an objection, of the materiality of which they could not at any period of the cause have been ignorant, and to which their attention must needs have been repeatedly directed.

Upon the merits of the case, supposing that we were now to dispose of the case on the evidence as it stands; and when we consider that the evidence of Mr. Nicol, senior, is at present in the case, there can be no doubt that we possess better

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materials for coming to a decision than we could have in a new suit. It does not appear that any injustice can be done to the Respondents, or any favour shown to the transaction, inconsistent with the principles of courts of equity, if this long litigation is here determined by sustaining the Appellant's claim under the bond.

It is impossible to compare this with the cases, to which it has been likened, of *Huguenin v. Baseley*, and *Selsey v. Rhodes*; and if any credit is given to Mr. Nicol's examination, no one can suppose that there was any fraud on the part of the obligee from the nature of the transaction. They intended a bounty, though a bounty certainly dictated by gratitude for services.

There was nothing of complexity in the affair. They are found to have been fully aware of the sum, and to have altered it from 10,000*l.* to 12,000*l.* upon some discussion. That they became liable on their seal, and from the moment they executed the parchment they must have known of course. But Mr. Nicol assured them that, during their lives, he should keep it inactive, and he did so. The case of *Harris v. Tremenheere* * was in every way a stronger case of suspicion than this, and there the transaction was supported. I have, in the former stages of the case, stated that the only circumstance to which any importance can here be attached, as against Mr. Nicol's conduct, is his having employed his own solicitor to prepare the bond. But as it was a mere common money bond to be filled up, very little turns upon this, and the matter is worse in appearance than in reality. It

* 15 Ves.

is probable that the two ladies might not wish their own solicitor to be called in upon a matter requiring no explanation, and very little to be done, even if they had any professional man regularly employed in their affairs, which does not appear to have been the case.

Taking the facts as they are before us, there seems every reason to hold, in Lord Eldon's words on *Huguenin v. Baseley*, that the gift was "the free, voluntary, and well understood act of their own minds." We should not be justified in speculating on possibilities, and running after the means of raising suspicion, when all chance is at an end of further light being thrown upon the question, and no new investigation can give us even so much evidence as we now have for our guide. I therefore propose to move that the judgment should be reversed.

Judgment reversed.

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APPENDIX.



SCOTLAND.

(COURT OF SESSION.)

KEBLE - - - - *Appellant ;*
 TEMPLER - - - - *Respondent.*

A sum composed of principal and Indian interest having been found due to A. with a direction and declaration that it should be remitted from India with interest at five *per cent.* to the time of remittance, deducting the cost of remittance and property-tax ; held, that the usual remittance of one *per cent.* should be allowed — but not one year's interest upon bills, as if drawn for the purpose of remittance according to the alleged custom in Indian transactions, especially as the rate of exchange during the period was at two shillings the rupee, and, that property-tax upon the consolidated sum should be deducted from the date of the order for payment to the time when the tax was repealed.




July 7. 1830. **THE Lord Chancellor.*** — In the case of Keble and others against Templer, which was argued at your Lordships' bar some time since, and which stands for judgment, the case is of this description : Page Keble the elder, in the year 1785, deposited certain bonds of the East India Company in the hands of a house at Calcutta, in which Mr. Graham was a partner ; those bonds were deposited with instructions that they should

* Lord Lyndhurst.

be applied in a certain mode. Mr. Keble shortly afterwards left Calcutta, upon his return to England, and died upon his passage. The bonds which had thus been deposited in the house in India were applied to the purposes of that house, contrary to the object for which they were deposited. It appears that one of the partners in the house, whom I have mentioned, Mr. Graham, had property in Scotland, in consequence of which a suit was instituted against him in that country for the amount of the bonds which had been thus misapplied.

In that suit a judgment was recovered, and from that judgment there was an appeal to your Lordships' house. Upon that appeal the judgment of the court below was affirmed; the cause went down again for the purpose of settling the account, and making certain other allowances, and it afterwards found its way to your Lordships' house *, and your Lordships upon that occasion made a declaration, out of which the present case arises. The declaration was in these terms: "It is declared by the Lords Spiritual and Temporal in Parliament assembled, that the Appellant is to be charged with interest at the rates following, viz., with interest at the rate of 12*l.* per cent. upon the balance of any account which shall appear to have been stated and signed, and which is mentioned in the summons in this action; such interest to be calculated from the date of the account so stated and signed to the 10th of November 1813," (being the date at which the judgment of the court below had been affirmed in

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* See the case reported, vol. ii. p. 126. *Old Series.*

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your Lordships' house ;) "and with interest of the several bonds in the proceedings mentioned at the rate per cent. which they respectively bore, until the times when they were respectively paid and discharged, or indorsed away, and value was given for the same; and with interest at 12l. per cent. from and after such times respectively, to the said 10th day of November 1813, when the former appeal was dismissed in this house; but that the Appellant is to have proper and just allowances and deductions made in respect of partial payment, if any, which he can instruct to have been made, and in respect of interest thereof, and also a deduction of the charge of remittance to Great Britain of the consolidated amount of the debt which shall be constituted against him, up to the said 10th day of November 1813. And it is further declared that the Appellant is chargeable with interest at 5l. per cent. upon such consolidated amount of debt, from the said 10th day of November, 1813, until payment thereof, but with a due deduction of the property tax upon the amount of the interest of such consolidated amount of debt so being, and at such rates as the same were chargeable upon the Appellant's property in Great Britain. And it is ordered that with these declarations the cause be remitted back to the Court of Sessions in Scotland, to do therein as is just and consistent with these declarations."

The principle of this declaration appears to be this, that these bonds being Indian bonds, deposited in India, and having been misapplied by the house in Calcutta, it was to be considered as an Indian debt, bearing Indian interest up to the time when the judgment of the court below was finally

affirmed in this house. At that period, the interest at the rate of 12% per cent. was to be added to the principal, and was to create upon this judgment a debt so consolidated of principal and interest, upon which interest at the rate of 5% per cent. was to be paid by the Defender; that was the principle of your Lordships' declaration.

The cause went down again for the purpose of making the calculations and deductions as directed by your Lordships, and it has again come here on two points to which I am about to call your Lordships' attention. One point is with respect to the charge of remittance. Your Lordships will find that in this case there was to be "a deduction of the charge of remittance to Great Britain of the consolidated amount of the debt constituted against the Defender up to the said 10th day of November 1813;" and as to the meaning of this declaration as far as relates to the deduction for the charge of remittance, I conceive that the true interpretation of the judgment of your Lordships' house was, that this case was to be considered as if the money had remained in India up to the period of November 1813, when the judgment of your Lordships' house, affirming the judgment of the court below, was pronounced. Up to that time the Defender was to be liable for Indian interest; and the Plaintiff was to have the benefit of Indian interest. It seems to have occurred to your Lordships, that as the money was thus to be considered as in India, a deduction should be made in respect of the charge of remitting it to England; and I think the meaning of the declaration is, that the charge should be estimated as it would have existed in November 1813, the period at which the Indian

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interest was to terminate. Now, with respect to the charge of remitting the money from India to England, there is a regular charge of one per cent. for commission ; but it is stated, that in addition to this charge of one per cent. commission, it is usual to draw bills payable a year from the date, and that this is to be considered as part of the charge of remittance. It appears to me that the period which bills so drawn have to run, must of necessity be taken into account in the rate of exchange; and that the true mode of estimating the charge of remittance by the purchase of bills, is to ascertain whether the loss by the interest was compensated by the rate of exchange. Now it appears by the evidence in this cause, if we are to have reference to the period of November 1813, or, indeed, if we are to have recourse to any period within five or six years of that time, that the rate of exchange was such, that, considering the question in this way, no loss whatever would be sustained on the transmission of the money in the shape of a bill of that description. It appears to me that, under these circumstances, no deductions ought to be made in respect of the interest ; and the Appellant can have no right to complain of this, as it appears to me that the original debt was calculated at the low price of two shillings for the rupee.

This appears to me to be to the true interpretation of your Lordships' declaration, that the party should be placed in the same situation as if this money had continued in India during the whole period, when, by the judgment of this house, it is to bear Indian interest, and that then it should be remitted to this country, at the charge of the party on whose account that remittance was to be made.

The next point for your Lordships' consideration will be, with respect to the deduction for property tax ; and it appears that by an interlocutor pronounced in 1816, an order was made by consent, that the property tax should be deducted from the year 1808 ; but against that interlocutor there was an appeal to your Lordships' house. The Appellant was dissatisfied with that interlocutor, and that subject was taken into your Lordships' consideration at the time when the declaration was made to which I have referred. Now, the question with respect to the property tax will depend entirely on the construction of this declaration. It was not competent for the Court below to go out of the declaration ; and the question is, what is the fair import and construction of the declaration. The declaration is, " that the Appellant is charge-
" able with interest at 5% per cent. upon such con-
" solidated amount of debt, from the said 10th day
" of November, 1813, until payment thereof ; but
" with a due deduction of the property tax, upon
" the amount of the interest of such consolidated
" amount of debt so long, and at such rates, as the
" same were chargeable upon the Appellant's pro-
" perty in Great Britain." Nothing can be more precise than the language of that declaration, that it refers to the consolidated amount of the principal and interest, and that it is payable from the month of November in the year 1813 ; and the only deduction to be made, according to the language of the declaration, and which appears to me to have been intended to embrace the whole question, is a deduction of property tax, from that period up to the period when the property tax should cease to have operation. It appears to me,

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therefore, that as far as relates to that part of the case, the decision of the Court of Session is perfectly correct and ought to be affirmed. I should propose to your Lordships, that the former part of the decision of the Court of Session should be reversed, and that this part of the decision of the Court of Session should be affirmed.

Ordered accordingly.

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SCOTLAND.

(COURT OF SESSION.)

TAYLOR - - - - *Appellant,*
FORBES and Others - - *Respondents.*


Where trust-money in the hands of a debtor was applied by a banker in payment of his debt: held, that it was a proper case for issues to be directed to inquire how much of the money had been so applied, and whether the creditor at the time of the appropriation knew that it was trust-money.

LORD WYNFORD. — This was an action brought in the Court of Session in Scotland, by the Appellant, as one of the children of a person of the name of Taylor, claiming against the Respondents the sum of 5000*l*. This sum of 5000*l*. had been deposited in their hands by the father of the Appellant, who was a partner in the house of Taylor and Company; but for some time before his death this sum, which had at one time been part of the capital of Taylor and Company, was separated from the capital of Taylor and Company, and deposited in the house of the Respondents. Sir William Forbes and Company are eminent bankers in Scotland.

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Previous to his death, John Taylor had made a deed of disposition of his property to take effect at his death. This money had been standing so long in his name that it had produced interest to the

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amount of 1700*l.*, and of this sum, under the circumstances which I have mentioned, John Taylor made a deed of disposition to take effect after his death, by which he gave the money to Patrick Taylor his eldest son, in trust during his wife's life, for her to receive the income during her life, and after her death in trust for his children.

It is not necessary for me to state, with any degree of precision, the terms of that deed: it is enough for my present purpose to state, that all the property he died possessed of was devised with certain trusts; the property being in the hands of the Respondents, the bankers. After the death of the elder Taylor, the property remained standing in the name of the elder Taylor for two or three years. During that period the business of the house of Taylor and Sons was carried on by the sons, still in the name of the father, — though the father being dead, as far as concerned him he was out of the question; — they were alone responsible for the debts of the house; the house was in solvent circumstances, and flourishing down to the time of his death; but after his death it became embarrassed, and the Respondents knowing that, pressed the house of Taylor and Sons to make good certain payments that were in arrear, and to settle their accounts. In consequence of this, after some time, the 1700*l.*, which was the interest upon the 5000*l.*, having been first transferred into the name of Patrick Taylor, the son and executor, was afterwards, almost immediately, paid over to the house of Sir William Forbes, by whom it was applied in liquidation of the account existing between the house of Taylor and Company and the Respondents.

The 5000*l.*, the principal sum, was suffered to remain with them for two or three years ; but they were in great distress, and it was in evidence that the bankers pressed them for payment. It was in evidence also, that at that time the bankers had in the hands of their man of business, their professional adviser in Scotland, this very deed of trust, so that they were well acquainted with the terms of it : that being the case, in consequence of the state of the account, they pressed this gentleman to make some arrangement ; being so pressed, the 5000*l.* is transferred from the name of John Taylor the father, in which it had stood for three years, (and, therefore, known to this house to have been the property of the father,) first into the name of Patrick Taylor the son, and from him almost immediately afterwards into the account of this insolvent house.

It is a matter of some dispute, how much of that sum of money these bankers took, in satisfaction of the debt due from this insolvent house ; I rather think, from inquiry into the circumstances, it will be found that they took very nearly the whole ; but that is not necessary to be ascertained here : the only question is, whether, under the circumstances of this case, they ought not to have inquired whether this was not the property of John Taylor the father, and whether, at the time when these Respondents took this sum in satisfaction of their own debt, they did not know it was the property of John Taylor the father. An inquiry of this sort was pressed upon the Court below, but it was thought impossible that such an inquiry should be made. It is my misfortune to differ from the Court below in that respect ; I think the inquiry most

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material. I speak with some degree of fear upon a subject of this sort in the presence of my noble and learned friend, so much more conversant with what passes in courts of equity, and all other courts, than it is possible for me to be, but I believe there is no doubt that, in our courts of equity, the doctrine is the same; though our institutions are different, the maxims of equity are the same; if a man allows his debtor to pay his debt, with money which the person receiving that debt knows does not belong to him but to another person, he shall not hold it against that other person, or, to use the words frequently used in cases of this sort, a Court will not allow one man to assist another in the commission of a fraud, or a breach of trust. The law of Scotland, as far as I can gather from the institutional writers, is the same; I do not see how there can be any difference in the law of one country and another upon this subject, where the law proceeds upon the principles of common sense and common honesty; nor do I see how it can be permitted to any man to say, I will keep this in discharge of my debt, though I know it does not belong to you who pay it to me. Erskine and Bell, and other writers upon the Scotch law, have laid it down that, as long as property can be distinguished and known as the property of a deceased person, it is to be applied to the payment of his debts, and it cannot be the property of the person who assists in applying it in payment of his own debts.

It appears to me that these are sound principles to go upon, sanctioned by the courts of equity in this country, and the Court of Session in Scotland, which is a court both of law and equity; and

I cannot help thinking that it is not fit that this case should be considered as finally decided till these two points have been ascertained, upon which there can be no legal presumption; namely, first, what portion of this sum of 5000*l.* has been applied by these Respondents in payment of the debts due to them from the house of Taylor and Company; secondly, whether, at the time when they took this sum of money in payment of those debts, they did not know that it was the property of John Taylor.

I move your Lordships that the interlocutor of the Court below be reversed, and that the Court below be directed to send the issue which I have drawn out in proper form, for the purpose of ascertaining by a jury, (and there cannot be a fitter case than this to be submitted to a jury, who are competent to look into the account, and far more competent than any court of law can be,) whether, at the time when the Respondents received this money, they did not know it was the property of John Taylor, clothed with the trusts of this deed of settlement.

Interlocutor reversed and cause remitted.

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 DUNLOP
 v.
 DALHOUSIE.

SCOTLAND.

(COURT OF SESSION.)

DUNLOP - - - - *Appellant,*
 DALHOUSIE - - - - *Respondent.*

Corn purchased in open market may, by the law of Scotland, be recovered from the buyer to satisfy rent in arrear for the current year—the corn being part of the produce of that year of the land rented.

26th Nov.
 1830.

THE Lord Chancellor.*—This case turns upon the principles of the law of Scotland, which is in many respects very different from our own; and it is contended, on the part of those who are here to support the judgment, and on the part of the learned judges themselves, that questions of this nature demand much attention before a satisfactory decision can be given.

This being the case, I have listened with very great attention and anxiety to the arguments on the part of the Appellants and the Respondents, and to the reasons which have been given by the learned judges upon this subject; and I must confess the doubts (and I may say the difficulties) with which I was embarrassed from the beginning have not as yet been removed. But upon a question of this importance; on a question, the greatness of which depends, not upon the limit which you may

* Lord Brougham. The facts appear in the judgment.

think proper to set to it, but which depends entirely on, and is measured by, the important principle of mercantile law, which the decision of your Lordships will go to establish, one way or other, in the kingdom of Scotland, the result of your opinion being whether or not the law of Scotland, with respect to this most important subject, shall be similar and in unison with that of England (for at present it is evidently different), or whether or not the very great and serious inconvenience shall continue to exist in regard to the transactions of mercantile men, in regard to the most important article of life, whether or not those inconveniences shall by your decision cease to exist, which, according to the present state of the law of Scotland, now characterize their mercantile transactions; I say in this case I own I have some little hesitation in saying whether some legislative enactment might not be necessary. But that is a matter for your Lordships' consideration in another capacity; yet there being an important consideration which is involved in this subject, I certainly do not feel that I ought at present to call upon your Lordships to come to any definite judgment; I propose, therefore, to defer for a few days the further consideration of this question. During that interval I shall deem it my duty (in order the more effectually to assist your Lordships in coming to a right decision) to read again carefully the whole of these voluminous papers, and to examine more minutely the points which have been stated at the bar, and in the result of the examination I shall come to that conclusion which I think the question is entitled to; I shall, with all the deference, and with the most unfeigned respect which

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is certainly due to those learned Judges, and the very great authority to which their decisions are entitled, if I feel that those doubts (and I may say difficulties) have not been removed, there being no authority in any thing like recent or modern times; and after the law has assumed its present shape, for it is admitted on the other side (that is, by the Respondents), that the law has introduced some material change; I say again, if those doubts (and I may say difficulties) shall continue, and are not removed, I shall, however reluctantly, submit to your Lordships' approbation the propriety of reversing this judgment; and acting upon the principle which I have before laid down, if I should think it necessary to set it aside, I should have many reasons upon the subject to offer.

The Lord Chancellor.—In this case, which is of much importance to the general principles of the law of Scotland, which differs materially from the law of this country in the respect I am about to point out, I move your Lordships to resume the further consideration of it, with a view to proceeding to judgment.


When this case was argued, which it was with very distinguished ability and great learning on both sides of the bar, it appeared to me to involve questions of apparently so alarming a description to the commercial interests of that part of the United Kingdom, and of a nature so extremely inconsistent with all principles, and so utterly repugnant to the most established doctrines of English commercial law, as well as the law of landlord and tenant, that I deemed it necessary, before I proposed to your Lordships either to affirm or reverse the decision of the Court

below to take a short time thoroughly to examine the cases cited, and the authorities quoted on the one side and the other, in order that I might be able to advise your Lordships, upon more mature deliberation, and with greater security to the administration of justice. I have now gone through that inquiry, in addition to the attention which I bestowed on the argument at the bar; and the result of my deliberation has been, I will not say, materially to change the opinion which I felt at the close of the argument; but it has been to remove all doubt which I might then entertain upon the subject.

The facts of the case are extremely short. I will state them to your Lordships; and you will at once perceive not only the nature, but the difficulty and the great importance, of the principle in question.

My Lord Dalhousie brings his action against a corn-merchant, in East Lothian, the county in which his estate is situate, for what is called repetition, which your Lordships know means payment back to him of a certain sum of money, being the value of 60 sacks of corn purchased by that corn-factor, in the public market place of the town of Haddington, one of the largest grain markets in Scotland, of a tenant of my Lord Dalhousie. I am exceedingly rejoiced at the presence of the noble and learned Lord (the Earl of Eldon) on this occasion; because, though he had not the opportunity of hearing the argument, he will, I am sure, agree with me in the complete novelty to English lawyers of the holding of the learned judges in the Court of Scotland, to which I am about to advert. Lord Dalhousie brings this action not

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against his tenant, but against the purchaser from the tenant, in what we call Market overt (Public Market), perhaps the greatest corn market in Scotland—that of Haddington, the capital of East Lothian. The tenant's rent was in arrear for that year, of which the corn sold was part of the crop. It is not pretended, indeed it is distinctly denied and negatived by the whole findings in the case, that the cornfactor had any knowledge whatever of the arrear of the seller's rent. It is admitted he paid the full price of the corn. It is admitted that he was in perfect *bonâ fide* in the whole course of the transaction; that there was no fraud, no collusion whatever between the tenant and the purchaser, with respect to the rights of the landlord; nor any intention on the part of the purchaser to defeat the landlord's claim. Now the decision of the Court of Session, so astounding to every English lawyer, is neither more nor less than this: that the landlord has a right to call upon the purchaser, and say, "Notwithstanding you were a *bonâ fide* purchaser, without notice, in open market, but a purchaser by sample and not in bulk, you must pay to me the whole price which you have already paid to the seller, that being due to me, the landlord, in respect of my tenant's rent, which was in arrear for that year, of which the corn sold formed a part of the produce."

The first thing which strikes every one acquainted with the law of England, is that, if this judgment is consistent with the law, it becomes extremely difficult, if not quite impossible for any person safely to deal in corn, because when he goes even into open market, he must ask the question of every man, who sells to him, if he is

a tenant, “Is your rent in arrear? how is your account with your landlord?” And even if he tells him that his rent is not in arrear, he still must act at his own risk, because if the tenant should be found to have deceived him, though true it is he might have an action against him for the deceit, yet the falsehood of that representation would not defeat the landlord’s right; he must equally pay the price of the corn over again, and therefore he must take another precaution; he must go and ask the landlord, “I have been in Haddington market to purchase corn of your tenant; but not being sure how your accounts stand, I have come twenty miles off to know whether his rent is in arrear.” Nothing short of that can make a man safe, according to this decision.

If this were a decision in a matter of English law, instead of Scotch law, nothing would be more simple or more easy than the decision of this appeal, and nothing more erroneous, not to say more startling, than the decision of the Court below; but there are one or two admissions, and one or two statements not contradicted on the other side, which plainly shew that the Scotch law proceeds upon principles diametrically opposite to those of the English law. In the first place, if a tenant sells in the most honest and regular way possible to a corn factor or other purchaser not in the market in bulk, without any knowledge on the part of that purchaser of the state of the tenant’s account with his landlord, or any fraud on the part of the purchaser, or any collusion, it is admitted on all hands, and no one conversant with the law of Scotland affects to doubt that that is a bad transaction, that the land-

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lord may recover the goods by an action in the nature of an action of trover, or the price of them, as being paid in wrong. In the next place, it is admitted that if the sale is in the public market, and the purchaser acts *bonâ fide*, and without notice of the debt of the landlord, provided he has not paid the price, although the contract is completely executed between them, the purchaser is bound to pay the price to the landlord.

These being matters agreed to on both sides, it is perfectly evident to my mind, when I come to look into the case, that the Scotch law proceeds on perfectly opposite principles to those furnished by the law of England, and the more I have enquired the more I have been satisfied as to that fact. It turns out that in the times when this law was originally established, the landlords being the law makers, the hypothec, as it is called, of the landlord over the tenant's stock is of a nature exceedingly different and much more extensive than the security of the same kind which your Lordships have for your rent in this country. You can distrain the goods for your rent only while they remain upon the farm, or a remedy is given under a particular statute, in case they are taken away in fraud of that right, to follow them within certain limits, and to deal with them according to that statute; but if the goods are sold to a *bonâ fide* purchaser, and that man is not in collusion with the tenant, it is clear that you have no such right as the Scotch landlord has. The Scotch landlord has a right of hypothec in the most strict sense; he can follow the crop wherever it goes, with one exception, viz. where it is sold in bulk in market overt.

The only question in this case seems to be this : Those which I have stated being the admitted principles of the Scotch law, is a sale by sample equivalent to a sale by bulk in market overt? Now, referring to the principles of the English law, I find that the landlord's right of hypothec in Scotland is to be compared to the right the owner has in England of recovering goods the property of which has been sought to be changed, but which cannot be changed by stealing those goods, but in which there is one exception exactly analogous to the exception to the landlord's right of hypothec in Scotland ; namely, the goods being sold in market overt. Your Lordships will, I apprehend, require no argument to shew that the law, with respect to market overt in England, applies only to sale by bulk, and does not at all apply to sale by sample. Your Lordships are aware a case has been positively decided, that the whole sale must be completed in the market overt. There is a very celebrated case in Coke's Reports, entitled, "The Case of Market Overt;" in which it is held, that the goods must be sold in a shop accustomed to sell those goods, so that the possessor cannot change the property by selling silver-smiths' goods in a scrivener's shop, which was the question raised there ; but the whole must be sold in the open market, not behind a screen or cupboard, but so that the passengers passing by could see it : they must be so sold that the transaction of the sale must be visible to passers by ; that is the foundation of the principle. Your Lordships see, therefore, that the English law principle, with respect to sales in market overt, is precisely the Scotch law principle, applying in the one case to the new


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change of property feloniously stolen, and in the other case to the landlord's right of hypothec, which is peculiar to Scotland, and not unknown to this country. I have had a good deal of communication with very learned persons in Scotland as to the practice among tenants, flour factors, and merchants; and I find there was a great difference of opinion in the trade, as to the rights of the respective parties until this case of Lord Dalhousie. The largest corn factors in Scotland, whose transactions amount, probably, to as much as all the rest put together, say they never dreamed of such a risk being run; and that having transacted business to the amount of hundreds of thousands of pounds, they never yet thought of asking the question, whether the tenant was in arrear: but the decision in this case has created a great anxiety that the law should be settled one way or the other by your Lordships.

On the best consideration I have been able to give to this subject, on the ground on which the Scotch Judges put it, admitting there is no decided case, admitting that the other cases resorted to as authority for the decision do not bear them out; because in each of those cases there was a great doubt upon the fact whether the whole sale was in open market, and whether there was not collusion with the tenant on the principle of the law upon the application of the principle of market overt, which clearly is the doctrine to be applied in this case, when your Lordships find the landlord has, what he has not with us, the right of hypothec; it certainly appears to me, which I would state, however, with submission to your Lordships, that the grounds of judgment, though

at first they appeared to be incumbered with great difficulty, from their being so irreconcilable to our own decisions, are well founded. If the case had been what we call doubtful, and it had been a measuring cast between the two grounds of decision, one should have leant very strongly against a decision so greatly tending to fetter commerce as putting aside an express sale by sample ; but, however inexpedient such a law may be, and however much that inexpediency is to be complained of by his Majesty's subjects in Scotland,—not only the dealers in corn, but all the consumers of corn,—however it may call upon your Lordships to apply, in your legislative capacity, a remedy for this, yet in your judicial capacity you have no course left but to affirm the almost unanimous decision of the Court below. All the Judges were consulted ; some of the ablest Scotch lawyers have appended their names to this opinion, and there is but one dissentient voice out of the whole. It is not for Judges to decide, whether the law shall be put in force or not ; Judges have but to administer the law ; the Judges in Scotland have administered the law as they find it ; your Lordships are now Judges by appeal on their judgment, and in your judicial capacity, I humbly submit, your only course is to affirm that decision. Under the circumstances of the case, my Lords, I should not propose to your Lordships to give any costs.

Interlocutors affirmed.

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(COURT OF SESSION.)

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Where there is no express contract between partners, it is not, according to the law of Scotland, a necessary presumption of law that the profits are to be divided in equal shares. But it is a question for a jury, upon evidence of all the circumstances (as goodwill, skill, capital, labour, &c.), what the proportion of interest in the loss and profit should be. As to English law, *Quære*.

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LORD WYNFORD.— It appears to me that the cases to which the learned Counsel have referred are decisive of this case. The judgment of the Court of King's Bench in the case of *Peacock v. Peacock* * does not appear to me to be at all affected by the decision † of Lord Eldon in the Court of Chancery, which has been referred to. I have looked, also, at that which is an authority, perhaps, higher than that even of the noble Lord to whom I have alluded, in cases of this sort; for though there can be no higher authority in questions of English law, the opinion of Scotch lawyers, upon questions of Scotch law, if there is any distinction, ought to prevail over the opinion of the highest legal authorities in this country. It appears to me that the opinion of my Lord Stair is decisive upon this subject, that the

* 2 Campb. 45.

† 16 Ves. 49.

Court of Session has taken a course which cannot be supported. The question in this case is, whether, when there is no agreement as to any specific share, the Court is bound upon a presumption of law to say that the profit and loss must be divided into equal shares. In the Court below, the Lord Ordinary had decided that it ought to be sent to a jury to consider, under all the circumstances of the case, what the proportion should be. The Court above, however, considered that decision of the Lord Ordinary incorrect, and so far reversed it that they took upon themselves to declare, and it is so stated in their judgment, that it must be taken as a clear principle of law that when there is no express contract varying the rights of the parties, the partnership property and the partnership profits must be equally divided.

I cannot help thinking that if that were the law it would be highly fit that it should be well understood, in order that the consequences might be guarded against; because the application of such a principle would undoubtedly prevent many partnerships which are beneficial to both parties, and especially to the party who takes the smaller share; because what person is there who is in the possession of an established business, in the possession of the goodwill of that business, that would take a clerk into partnership with him, if by the mere effect of taking him into partnership he was to confer upon him an equal share of all the profits? It would prevent young men from being advanced in life from the situation of clerks to the more respectable and more permanent situation of partners.

Whatever the convenience and inconvenience may be, if the law is so settled, your Lordships,


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sitting judicially, must decide according to law. I cannot, however, think it is so settled by the law of Scotland; the contrary appears clearly to be the understanding of Lord Stair, who is constantly upon questions of Scotch law referred to at your Lordships' bar. I had not read the valuable work of that learned writer till I had a seat in your Lordships' house, since which time I have most diligently studied it, and I have found it one of the most sound legal works I have ever met with. If the opinion of Lord Stair is consistent with law, this decision cannot be supported. Lord Stair says, "Society (that is, partnership) may be described a contract for communicating the profit or loss of that which is brought into the society proportionally, according to the share and interest of each partner." So that if they have different shares or interests; whether there is an agreement to divide or not, a division according to the proportion of the share and interest must be made. "It is true," says that learned writer, "that if there appear no inequality in the stock and industry of the partners, when no proportion is expressed equal share of profit and loss is understood." We must understand at what time Lord Stair was writing; he was writing before there was a jury court in Scotland, when the judges were called upon to decide the question of law and fact; and I take Lord Stair to say nothing more than that which I ventured, perhaps irregularly, to intimate to your Lordships a long time ago, as my opinion, that if I was to direct a jury, or was sitting in a situation to exercise an opinion both upon the law and the fact, I should say, if there be no evidence to guide my judgment, I will

divide it equally ; but I will not be content with merely written evidence, I will look at the circumstances, and I will infer as strongly from the circumstances the intentions of the parties as from the written evidence. Now, I think Lord Stair cannot be taken to go farther than this, sitting as a Scotch Judge, without the assistance of a jury. The fair way, if there is no circumstance inducing the Court to give more to one than to the other, is to give in equal shares. But let us see what Lord Stair says further : “ Or if the
“ skill or industry of some of the partners be of
“ great importance, the society may consist in
“ these terms that those persons shall have no
“ share of the loss, and shall have such a share
“ of the profit, according to the sentence of Sul-
“ pitius ; but if such inequality of industry, &c.
“ appear not,” (that is, if no such circumstances appear,) “ the sentence of Mucius rejecting such
“ inequality of shares is just, and there is no con-
“ trariety between the opinion of both,” which is coming back precisely to the same thing. If there is nothing to guide the judgment of the Court to give unequal shares, there is no rule for them to go by but to give in equal shares.

It is scarcely possible for a case to occur in which there will not be circumstances which it is fit to submit to the consideration of a jury, and which would induce a jury to give in unequal shares. Your Lordships will observe Lord Stair does not confine himself to any particular thing, but says generally “ inequality of industry, &c.” Now, in this very case, a man in an established business takes a young man into partnership ; that man who has an established business having the

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goodwill of the trade, which is a saleable, marketable article. If he admits a young man into the trade without his paying for that goodwill, that creates an inequality. Again, it is fair to presume, if he had been in the business a long time, his skill in the conduct of the business would be superior to that of the young man. There were those circumstances, therefore, to guide the judgment of the Court in deciding whether the share should be equal or unequal; and I cannot help thinking it would be gross injustice for the Court to proceed on any other principle than that on which they now go, as I think, according to the improved method of doing justice in that country, namely, of sending the question of amount to be tried in a Jury Court. The Lord Advocate desired your Lordships to take upon yourselves to perform that duty. I think, with humble deference, your Lordships would be taking upon you a duty to the discharge of which you are unequal. Perhaps I have had as much experience in those matters as most of your Lordships, but I profess myself totally incompetent to such an office. The fittest persons to decide a case of this sort are a jury of merchants, who can, from their habits, easily arrive at the circumstances of the case.

The case of *Brock v. Brown** is referred to; and it is admitted by Dr. Lushington, who is as remarkable for his industry as for his talent, that there is no other case except that and the case of *Peacock v. Peacock*. The case of *Brock v. Brown* does not appear to me to affect this case. The Court of Session did not decide in that case that they would not give unequal shares. It was decided only that persons being partners, the Court would

not allow one of the partners to claim for labour performed as a servant. I think the Court were perfectly right in that decision; for the moment a partnership is established, there is an end of any implied contract for service, and the parties could be considered only as partners, and not master and servant; that is all there is decided by that case.

Then, putting out of question the whole of that case, the opinion of Lord Stair is aided, undoubtedly, by the very accurate judgment of Lord Ellenborough, to which reference has been made, which is expressly in point upon the present occasion. It is supposed that Lord Eldon's opinion differs from that of Lord Ellenborough. If it had appeared to me that there was ground for that statement, I should have thought that this case ought not to be decided until we had an opportunity of consulting that very eminent Judge; but I think that is not the case. I cannot think that the report of Lord Eldon's decision is perfectly correct: for it is clear that Lord Eldon himself thought that a different proportion might be given, or his Lordship would not have sent it to an issue; and I think the issue would not have been so large if it had been sent merely to try whether there was any evidence of a partnership. When the case came back, Lord Eldon, who had directed the issue, to find not only whether there was a partnership, but in what share and amount, and who, having directed that issue, must be taken to have understood that the jury were to decide upon the *quantum*, is made to express his surprise at the *quantum* found by the jury. What led the noble Lord to express that surprise, I do not know. It cannot be taken from hence, I think, that they had nothing to do

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with the *quantum* at all, but merely that the *quantum* which they found was not the correct *quantum*. I am inclined to think that I can state the ground. It appears that the young man was taken into a business that had been long established by his father. From the experience I have had, — and I appeal to the noble and learned Lord on the woolsack whether I am not correct, — where a man, having an established business, takes in a young man as partner, he gives him a third or a fourth ; and a jury of merchants, knowing that to be as common a practice] as any which prevails in the city of London, adopted the principle of that practice. Whether Lord Eldon was dissatisfied with that allowance or not, I do not know; but I am quite sure if that question had been sent to a jury a hundred times, unless there had been some particular circumstances inducing them to vary and find a different proportion from that which was consistent with the practice, they would have found the same proportion.

Under these circumstances, unless my noble and learned friend on the woolsack should differ from me, I should move your Lordships that this interlocutor be reversed, and that the matter be sent back to the Court of Session, with a direction to send an issue to the Jury Court, to ascertain, under all the circumstances of the case, what is the fair proportion of this business to which this party was entitled.

The Lord Chancellor. — I so entirely agree in the view which my noble and learned friend has just taken of this case, that I should not have troubled you with a single observation further than doing myself the honour of seconding his propo-

sition, but that this is not a case where the opinion of your Lordships goes to affirm the judgment; and your Lordships are aware that, where a contrary course is taken, it is generally deemed fit, for the satisfaction of the parties, and out of respect to the Court, (which I most unfeignedly entertain for the very learned persons who constitute the Court,) to assign reasons for the reversal; I shall, therefore, shortly follow my noble and learned friend in stating my view of the case.

The point to which I wish to call the attention of the House is this: It is said that where parties are in partnership without agreement the presumption of the law is that there is to be an equal participation of the profits of the business. Now, for this, as a proposition of law, as has been correctly stated by my noble and learned friend, there is, I conceive, no ground. If it had been said that it was a presumption of fact, I could have better understood that than the statement that it is a presumption of law; for a presumption of fact may exist as a sort of ground on which a party proceeds, to be modified or affirmed by subsequent investigation of the fact, and, accordingly, I go further than my noble and learned friend. If I were trying at *nisi prius* the question what proportion the partners in a concern were severally entitled to, — (that being the question of fact sent to an issue by Lord Eldon, in *Peacock v. Peacock*, and tried afterwards by Lord Ellenborough,) — I should be disposed to advise the jury, leaving the matter to them, that an equal division would be a convenient doctrine of fact, and form the ground for a convenient inference to be drawn in the absence of other evidence; but that would only be supposing that there was no other evidence in the

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cause : if there was any other evidence that could be found to alter the proportions, that evidence must furnish the rule, and that would be an additional ground for saying that it must be a presumption of fact and not of law. But here the Court confound, as it appears to me, the presumption of fact and the presumption of law, and make that a presumption of law which I cannot conceive to be so ; for this reason, because if it be a presumption of law, *cadet questio* as to the fact. The evidence is of no importance whatever ; it is a presumption in the absence of a written contract, which overrules all proof ; it excludes proof from the nature of the case.

This is a proposition as to which I think the Court have been misled, in a case which does not appear to have been very explicitly stated, or to have occupied much of the attention of the Court : certainly it does not appear to have excited very great attention, for the Court appears to have fallen into this error, viz. to have laid down as an absolute presumption of law that which is only a presumption of fact. The doctrine goes this length, that whatever the circumstances might be, taking for instance the case of a banker's clerk who is taken into the house, which is put in one of the cases to which I will shortly advert, according to the decision of the Court, unless there be a special contract to exclude the legal presumption, the legal presumption shall give him an equal share of the profits, and shall exclude all evidence of the fact ; excluding all consideration of the particular circumstances of the case. That is a doctrine which this interlocutor has embodied, and to that doctrine I cannot, any more than my noble friend, accede in point of law. My noble

and learned friend, if he was sitting at *nisi prius* directing a jury, would, very probably, take that as the ground of his direction, as being the convenient division in the absence of other evidence to break in upon it. That is the line which I should adopt, considering it as a question of fact: and that is not peculiarly my view; for, in confirmation of the opinion of my noble and learned friend and myself, I would state to your Lordships that I have taken the opportunity which was afforded to me from one of the learned Chief Justices sitting in a chamber close by, as the argument proceeded, to communicate with him, and he informs me that he has no doubt upon this subject. When a case appears so clear which has been otherwise decided below, one doubts sometimes whether one is taking too confident a view of the case, and I wished to know whether the opinion and judgment of that learned Judge confirmed my own; and I have received an intimation that his clear opinion is precisely the same as that stated by my noble and learned friend, and to which I entirely accede, — that where there is no evidence, (not shutting out evidence,) but where there is none, he should in all cases direct a jury to take into consideration the fairness of an equal division; but not discountenancing evidence, rather courting evidence, rather regretting that there was no evidence, and only having recourse to that presumption in the last resort for want of evidence. This is not the doctrine of the Court below, for they say we do not court evidence; we, on the contrary, shut it out; for we conceive we are bound to give effect to this as a legal presumption to overrule it.

It is more satisfactory, in deciding on appeals from the Scotch Courts, where it can be done, to

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refer to cases in the Courts of Scotland, than in those of England. Nevertheless, the greatest deference is due to the authority of English Courts, whether of common law or of equity, in mercantile questions, because our law in that respect purports to proceed on the same principles as theirs; and I should with difficulty attempt to select any one chapter of the Scotch mercantile law which differs in its principles, or is intended to differ in its principles, though there is in some respects a difference in its details, from the law of England. Undoubtedly, if the cases in the Scotch Courts had been founded on different principles, and running in an opposite direction to ours, we should have been bound to prefer their authority to ours in such a case, but there appears to be no distinction.

I will first say a word with respect to the authority of the civil law, for I see that it is adverted to in some of the text writers. I deny that the civil law is of any authority in the Scotch law any more than it is in the English common law. Much of weight is to be ascribed to the authority of the makers of, and the practisers under, that most venerable system of jurisprudence, highly recommended by its great antiquity, by the number of ages during which it existed, by the numberless millions of people whose various concerns it regulated during those ages, and above all, by its beautiful symmetry, by its unexampled precision and fulness, by the consistency in principle of all the arrangements of that code. Nevertheless, it has no direct weight as an authority in the courts either of Scotch or English law, whatever respect may belong to it as a monument of the wisdom of old times, and the ability of learned men. But if there is any one point on which the

authority of the civil law shall not be taken to rule points in our day, it is in questions of mercantile jurisprudence, where the defective nature of ancient commercial dealings, and commercial institutions connected with them, and growing out of them, necessarily makes that code of infinitely less authority in mercantile than in other cases. I deny not that the rule laid down in this interlocutor was the rule of the civil law : it may be taken undeniably to have been so ; and that in order to exclude the inequality of shares of profits, it was requisite that there should be an express stipulation, in the absence of which an equal division was held to be the presumption ; I may say the presumption of law, a presumption by jurists, not to the extent of excluding an express contract, but held to be a presumption of law, as stated in this interlocutor. But I deny the authority of that as a direct authority ; I deny the weight of it in a question of mercantile law, in mercantile times, and in a mercantile country.

The authorities of the English law are the other way ; and as to questions of partnership, between partners, although one court has peculiarly the cognizance of these, namely the Court of Equity, inasmuch as in the courts of law they are considered as one and the same person, yet the question of the share in profits between partners comes with peculiar advantage under the cognizance of a learned judge like Lord Ellenborough, and a special jury of merchants in the city of London, who declare what is the result of the facts : no judge ever had greater experience in mercantile law, and no men are better able than those juries to decide by their good sense and mercantile

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habits. It appears in the report of the case of *Peacock v. Peacock*, that Lord Ellenborough entertained no doubt whatever: he excluded at once the idea of equal division, and directed the jury to take all the circumstances into their account, who I have no doubt, from their experience in the city of London, in which they carried on business themselves, found one fourth on the grounds stated, and the facts proved to be the proper division. But it is not merely Lord Ellenborough's decision on which I proceed here, but Lord Eldon's, for he sent the question to a jury; and if he had held that there was in the absence of a written contract a presumption of law in favour of equality, it would have been fruitless to have done more than send to a jury the question — Are A. and B. partners? which is the first branch of the issue; and then for the second — Is there any thing in their connection with each other to alter, by special contract, the presumption of law for want of an express agreement? Those would have been the questions Lord Eldon would have sent to the jury; and when it came back, instead of merely making an observation in disparagement of the verdict — for it went to no more—he would at once have said they had determined a question, which he had not sent to them; but if he had done so, it would have been a disparagement of his own direction by the issue: for he directed them to inquire what was the share and amount, and all he appears to have said on the matter afterwards coming before him was, “I do not exactly see on what ground the jury came to that conclusion.” If he had known as much as my noble and learned friend or as Lord Ellenborough knew from what

had passed before him in Guildhall, he would not have expressed his surprise; for it is not uncommon that that should be the proportion in the case of father and son. There was no new trial directed by Lord Eldon. It is said that they had acquiesced in the verdict, and, therefore, he was satisfied; but it appears that it was only as to the question of fact—the exact proportion of one fourth—that Lord Eldon felt a doubt, not seeing how that was established. It is a mere observation expressing a doubt as to the ground on which the jury came to that conclusion; but if he had not sent that to the jury as a question of fact, and they had so found, as it appears to me, Lord Eldon would have set that right, when it came on for further directions.

Such being the only matter laid before us with respect to English law, how stands the Scotch law as it appears from cases or the authority of text writers? The valuable authority of Lord Stair has been alluded to by my noble and learned friend. Mr. Erskine's is nothing in derogation of that authority, when accurately viewed; Lord Bankton's is an express affirmance of that authority, and then your Lordships have a case which has been cited, to the accuracy of which I hear no objection urged. I mean the case of *Russell v. Anderson*. There you find that the learned judge is dealing with this very proposition. He does not accede to this proposition of law as a general one; for he considers it to apply only to the predicament where parties associate on equal terms, both in stock and labour. In point of law, the party founds his plea on the equal rights of partners from which he derives the consequence, that if there be not indisputable evi-

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dence of a different arrangement, equal rights must be presumed. What is meant by equal rights strictly applies to the shares you have equal rights to: shares which may be equal, or unequal, according to the circumstances of the case. He deals with this as the proposition; he cites Lord Stair, and Lord Bankton; he then states that where there is room for doubt, it must be sent to the jury; he then cites *Peacock v. Peacock*, and he supposes the case of a clerk admitted as a partner into Sir William Forbes's banking house; adding, that it could not be supposed in such a case, though it is that for which the Respondent must contend, that he would be entitled to an equal share of the profits with the heads of that house. This is an authority precisely in point, and there is no authority on the other side.

Upon these grounds—taking it simply as a question of Scotch law, deciding nothing further, as it is our rule, or ought to be our rule, in no case to go further than the simple question before us; and saying nothing at all about *Peacock v. Peacock*, except to explain the discrepancy which is supposed to have existed between the Court of Equity and the learned judge at *nisi prius*; saying nothing respecting the law, except as a question of Scotch law, established by the decision of a learned judge, established by text writers of the greatest eminence, and established by decisions of the Court itself;—upon these grounds I concur with my noble and learned friend in advising your lordships to reverse the decision, and remit the cause to the Court of Session, in order that they may send the question to the Jury Court as they were in the course of doing, but for the impediment thrown in their way, by laying down a wrong position.

Interlocutor reversed, and cause remitted to the Court of Session, with a direction that the question of the amount of share be sent to the Jury Court for trial.

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The Lord Advocate made a short argument on the cross appeal. He contended that whatever the house might do in regard to the question of partnership, they ought still to decide that Mr. Campbell had waived all claims for further payment for his services as a clerk, when taken into partnership.

The Lord Chancellor interrupted him, by asking if this also was not a matter of fact, proper to be submitted to a jury.

The Lord Advocate admitted, that it was in some degree a question of fact.

The Lord Chancellor intimated, that both questions should be disposed of in the same way by reversing the interlocutor, so far as appealed from in the original, and in the cross appeal; and remitting the cause to the Court of Session, with an instruction to them to direct an issue or issues to be tried by a jury, in regard to the whole matters which were in dispute between the parties.

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OUCHTERLONY - - - *Appellant ;*LORD LYNEDOCH - - - *Respondent.*

O. was appointed, with five other trustees, under a deed which provided that every act done under the trust should be with the concurrence of at least three of the trustees. Three of the trustees advanced part of the trust-fund to K., one of the parties interested, upon the security of an insurance upon his life, in which act O. refused to concur. Upon the death of K. the insurance office, before payment of the money, required a discharge from all the trustees, of whom only three remained alive, in which discharge O. having refused to concur,—upon a suit in the Court of Session, it was decreed that he should execute the discharge, and concur in all lawful and necessary acts to give effect to the trust.

July 7.

THE Lord Chancellor.—This is an appeal from the Court of Session in Scotland. The case arises out of a trust-deed and disposition executed in the year 1802. By that deed the trustees who are named in the instrument being five in number, and to whom Colonel Kinloch was afterwards added, are directed to lay out a sum of 12,000*l.* for certain purposes upon lands in Forfar. The trustees acting under that deed laid out a sum to the extent of 8000*l.* and upwards, on lands within the description mentioned in the deed, and afterwards employed 2400*l.*, not in the purchase of lands, but in a loan to Colonel Kinloch, who was the heir of


entail and co-trustee. Colonel Kinloch, by way of security, insured his life with the Royal Exchange Assurance Company, and he also gave a security for the payment of the premiums.

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At the time when this transaction was under negotiation, it was communicated to one of the trustees, Mr. Ouchterlony, who dissented from it; he was dissatisfied with this mode of applying the funds, which he considered to be inconsistent with the terms of the deed, and in the course of the correspondence or communication which took place upon that subject, he said he would not act any longer in the trusts. By the terms of the deed, three of the trustees are declared to be a quorum. It was necessary that three should concur in any act; and any act done by them was declared to be valid and binding as long as there were three trustees remaining. Nothing further took place with respect to this transaction during the lifetime of Colonel Kinloch. In the year 1824 he died; at that time there were but three trustees living: Mr. Ouchterlony, Lord Lynedoch, and another. Application was made to the insurance office for the payment of the money. The insurance was made, and properly made, according to the law of Scotland, in the names of all the trustees. The insurance office refused to pay the money without a discharge from the three trustees. Application was made to Mr. Ouchterlony to unite in giving this discharge; he refused, and in consequence of that, this suit was instituted against him, calling on him to join in the discharge; and judgment of the Court of Session was pronounced against him to that effect; from that judgment there has been an appeal to your Lordships' House.

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After the judgment was pronounced, and, I believe, pending this appeal, Mr. Ouchterlony was advised to sign the discharge; a discharge was accordingly signed, and the money was paid. Still however, Mr. Ouchterlony has a right to your Lordships' judgment, with respect to the validity of the decision in the Court below. Mr. Ouchterlony stated, that he did not conceive he should be justified in signing the discharge; that it would make him a participator in the original act; that he had condemned the original act; that he was not liable by that deed for his omissions, but for his intromissions; and that, by signing the deed and receiving the money, he should be an intromitter, and should be liable, if the estate had suffered any thing by this mode of investing the funds. I apprehend that these objections were altogether frivolous. In the first place, if the money was misapplied — if it was an improper investment — it was the duty of Mr. Ouchterlony, as one of the three surviving trustees, to do every thing in his power for the purpose of recovering the money, that it might be invested more in conformity with the terms of the deed. The signing the discharge, under the circumstances in which he was placed, would not have made him a participator, or at all responsible for the original investment of the money. I conceive, therefore, that the excuse and reason he has assigned for not signing the discharge is altogether unsustainable.

There is, however, another part of this judgment which is material, and which is brought under the consideration of your Lordships' House. The Court below have not only ordered that he should sign the discharge, but they also declared

that he is bound, in the future management of the estate, to act along with the trustees, and to concur with them in all proper and necessary acts of administration, and have decreed accordingly. Now the question is, whether the Court below had authority to make a decree of this description. Mr. Ouchterlony has accepted the trusts. By the terms of the trust three persons were necessary to concur in any act to give effect to that act: all the trustees, except Mr. Ouchterlony and two others, had died. If Mr. Ouchterlony, therefore, did not concur in any act, nothing could be done under the trust. He had accepted the trust; and, according to the opinion and decision of the Court below, he having once accepted the trust, could not withdraw from it, so as to defeat the object of the trust; and it appears to me that this opinion is confirmed by the law of Scotland. But according to some suggestions which were stated at the bar, it was conceived that there was no authority to support such a decision. On the contrary, it was suggested that there were authorities the other way. I attended, however, with great patience to the statement of the learned counsel, and have since endeavoured to find such authority. I have found, however, nothing in any text writer, or any case to establish such a position; no such passage was quoted, no such opinion was referred to, no such case was shewn to exist. I therefore feel it my duty, under all these circumstances, to advise your Lordships to concur in the decision of the Court below; the effect of which is, to uphold this trust, to give effect to it, and to compel Mr. Ouchterlony, who accepted the trust, to act in discharge of it in the manner stated

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in this decree : that is, to concur in all lawful and necessary acts, for the purpose of giving effect to the trust to which he was a party, and which he had regularly accepted. I should, under these circumstances, humbly advise your Lordships to affirm this decree.

Judgment affirmed.

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(COURT OF SESSION.)

PENTLAND - - - - - *Appellant*;
 WILLOUGHBY - - - - - *Respondent*.

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Upon a contract for the sale and purchase of a wood, in which the vendor reserved a power to retain a certain number of acres to be taken out of the belt, and in a suit in the Court of Session respecting the price or value of the part selected to be reserved, evidence was admitted by the Court which ought to have been rejected, and judgment was given for the vendor, the purchaser not having asked of the Court to direct an issue to the Jury Court.

Upon appeal against this decision, the House of Lords, being of opinion that the judgment was supported by the other evidence in the cause, and ought to have been the same if the evidence improperly admitted had been rejected, and that the Court was judge of the law as well as the fact: Held that the judgment was right, and that an issue as to the value ought not to be directed.

N. B. That the same exception to the general rule as to new trials prevails in English courts of law, where, although the effect produced upon the jury by the improperly admitted evidence cannot be ascertained, the courts, in some instances, refuse to direct a new trial.

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**LORD WYNFORD.** — In this case objections were taken, and most powerfully argued, against the evidence received in this cause; and also an objection that the judges had taken upon them to decide a question of fact, instead of leaving it to a jury. I am decidedly of opinion that the evi-

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dence received ought to have been instantly rejected, and it would have been rejected in this country. I allude to the evidence of the document found in London, by which a price is set upon the acres; and I allude to the question asked after the man had sworn he had heard nothing: it having been permitted to ask him, "Can you say such a thing did pass?" when he had given an answer before, shewing that he was clearly incompetent to answer the first question. I agree with the learned counsel for the Appellant, that the extent of this wood was a question of fact, which ought to have been sent to a jury; but it seems that the parties did not ask to have it sent to a jury; and if they did not ask to have it sent, it was competent to the Court either to send it to a jury or not. They took upon themselves to decide, it not being asked to send it to a jury; and I think they have decided it rightly. When I say that I think they have decided it rightly, I mean that upon the evidence which was admissible, rejecting all the evidence I have alluded to, I think their decision is right. I have known some exceptions to this rule in England, that when it has been most apparent that the verdict must have been the same way, if the evidence received had not been received, the Courts have refused a new trial. Those are exceptions; the general rule is, when evidence has been received which ought not to have been received, as the Court cannot say what effect it has had upon the jury, to send it back to another trial. But there is a material difference between the case of a Jury Court and the Court of Session: the jury are the judges of the fact, and the judges cannot know the effect the evidence has had upon their

minds. The judges in Scotland are judges of the law and of the fact; and I believe in Scotland, as in courts on the Continent, though they have, with certain exceptions, the same rules of evidence that we have here, they do not so rigidly adhere to them, from the whole power being in their own hands, as to the effect to be given to the evidence.

But the way in which I shall put this case to your Lordships is, to put it upon evidence that is admitted on all hands to be good; and I say, putting it upon that, the judgment of the Court below is sustainable. I do not put it strong enough, when I say that it is sustainable; but if it was sent down again, and a different judgment was obtained, that judgment would work gross injustice.

What are the questions? One question is as to the extent of the wood purchased; that is undoubtedly, as I have stated, a question of fact. The second question is, whether the allowance for the belt or screen was to be paid by average merely, or whether it is to be made (a new point raised here, upon which I shall say a word by and by,) by value as well as measure. Now, upon the first point, as to the quantity purchased, I do not think it possible for any man to entertain a doubt. On the part of the Appellant it is contended, that he purchased 270 acres. On the part of the Respondent it is said that he purchased 203 acres; but is there not one fact in this case decisive as to the quantity purchased? The first offer made by the Appellant is an offer of 10*l.* an acre, and the sum offered brings it exactly to the quantity of 203 acres. It is quite clear, therefore, when they were calculating the price per acre, it was understood on each side that the quantity was what I have

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mentioned. Taking the other sum at 12*l.* an acre, according to the sum proposed by the Respondents, it makes 203 acres. After that, it is impossible to doubt that 203 acres was the quantity, and not 270.

But there is another very strong circumstance. The 203 acres are bounded by the road; and what is more strong than that, there is the moss dyke: for what purpose was that put there? Not to keep cattle going from one part to the other, for cattle were not put in; it was only for the boundary: the part above the dyke was plantation solely; the part below the dyke not plantation.

I am of opinion that 203 acres were purchased; and 203 acres the Court were of opinion the party was entitled to receive.

Then that brings us to the other question; and my opinion is founded upon that, not by going out of the contract; I take it upon the contract itself. I agree with Mr. Brougham entirely, that when a contract is reduced into writing, any previous conversations or writings, except as they are confirmatory of the written contract, ought to be rejected; for this plain reason, that the parties to the contract talk about a thousand different things that ought not to have any weight upon the contract, because each party might have given way. You are not to attend to what passes before the contract, but what passes when it is reduced into writing.

Now let us look at what is the contract, as it appears. This is the proposal of Lord Gwydir's agent: "From the estimate of the quantity  
"and size of the timber on the Stielitz plant-  
"ations, it appears that the amount of such valu-

“ ation at the lowest average would be 2452*l.*,” that is taking it at 12*l.* an acre, instead of 10*l.*, offered by the letter immediately preceding; “ for which sum I now make you the offer of that wood, to be cut and paid for according to the agreements drawn out by us when you were in London last;” that is, “ the whole to be cleared off in three years from the commencement of the cutting.” Upon this I should certainly say that there was no other agreement or agreements that could be adopted into this, but what related to the cutting in three years. Secondly, it is to be paid for by bills at six months, dividing the whole into six payments, of which the first payment to be paid in advance, and a bill given at six months for the next payment, and the wood reserved to be deducted at payment of last bill. Thirdly, the screen of wood to be not more than twenty-five Scotch acres, nor less than fifteen acres, and chosen by the proprietor or his agent. Fourth, a third of the whole plantation to be cut and cleared yearly, and that in one part only.

Then the answer to this is: “ I was favoured with yours of the 21st current, making me an offer of the timber on the Stielitz plantations, at 2452*l.* sterling. Although I have again perambulated them,” — so that this gentleman undoubtedly knew the extent of the wood, and what he was purchasing, — “ I really think the same is high.” That he would say if they had asked him 5*l.* an acre, I dare say, as we may collect from his legal reason; “ but I shall throw myself entirely into your hands; and when you consider it is clearing you without further trouble,” — he might have added, and making an amazing good

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bargain for myself, — “ I hope both Mr. Burrell  
 “ and you will be disposed to give me an abate-  
 “ ment, and make each payment of the six 350l.,  
 “ which would make 2100l. instead of 2452l. That  
 “ I leave entirely to Mr. Burrell’s consideration  
 “ and yours; for a person taking off-hand such a  
 “ bargain should have a little latitude, and there  
 “ is considerable risk. Please receive inclosed a  
 “ bank draft for 350l., payable to you or order,  
 “ which would be the first instalment of the price,  
 “ if allowed to be 2100l.; but if it must be more, if  
 “ you are so hard-hearted as to exact 12l. instead  
 “ of 10l.,” — for that which I afterwards tell you  
 is worth 40l., — “ I shall send it with the bill for  
 “ the next instalment, at six months, on com-  
 “ mencing cutting, which I shall do in a short  
 “ time.” That is all that is material.

The question is, whether there is a contract to pay according to price, or according to value, upon the face of this instrument. Let us see what this gentleman is contending for. He contended afterwards that it was to be taken according to value, but not the value to be found comprising that contained in the belt with the other part of the wood, but according to the market price, and he says it is 40l. It appears that he had bought it at 12l. The point he is complaining of now is entirely an after thought — an attempt he makes in the first instance. Having purchased at 12l. an acre, he thinks he is to sell back eighteen acres at 40l. : a more iniquitous attempt was never made. The arguments of Mr. Brougham and Mr. Romilly would be deserving of great weight, if there was a reservation of the eighteen acres, to be taken out of any part of the property, but that is

not so: fifteen or twenty-five acres are to be taken from the belt, to form a screen round the estate. It was known from what part of the wood they were to be taken; and if this gentleman knew that, and that what was likely to form a screen was more valuable than the rest, after his perambulation he would have said, ‘ You are going to make a screen, and that which you are going to take is of much more value than any other part, and you must pay me more for it.’ He does not say a word of the kind, and it is clear that he considered the belt and the other part of equal value; probably he considered the belt of inferior value, for as the belt formed a screen to the others, the trees comprised in the belt might not be so large as the trees screened by the belt. But according to this contract, and the conduct of the parties upon it, if, when forming this belt, the Respondent’s steward had dipped in further than was necessary for the belt, the other party would have had a right to object, and say ‘ You are not taking it for a belt, but because they are large, good trees; which is not consistent with the terms and spirit of the contract: you are only to take that which is necessary to form a belt.’ And if that objection had not been entered into, and he had gone into a court of justice, and had said, ‘ Under the pretence of a belt, by making an angular line, you have embraced trees that cannot be necessary for the belt,’ —if that had occurred, he would have made a good case, and the Court would have done justice between the parties; but he makes no objection; he is present at the time when the belt is staked out, and the witnesses say they heard no objection made. But if any thing unfair had taken place upon the occasion, would not this

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gentleman have sent a written notice, and said, 'You have gone beyond the extent of your right'? I say he has completely acquiesced in taking this belt as it was fairly set out; and if it was fairly set out as a belt or screen, it is to be taken as of the same value as the other; and if we were to send it down to an inquiry whether it was of equal value with the other, I rather think this gentleman would not then have so large an allowance as he is now entitled to, but it would be prolonging litigation: I am extremely sorry to see that a small question of this sort has been in dispute from the year 1819 or 1820 down to the year 1830: we will not indulge Lord Gwydir, if he was to ask it; and it may prejudice the other party, by sending it down again to make the inquiry whether the belt was of equal value with the rest of the plantation.

Confining ourselves to that which is to be found within the four corners of the contract, it is evident that all the 208 acres were regarded by both the contracting parties as of equal value, and that it therefore applies to the only mode by which the apportionment can be made. When this gentleman takes his objection afterwards, he contends that he ought to be paid at the rate of 40*l.* an acre, and that he had bought the whole; whereas he had only bought the whole except such part as Lord Gwydir, under the instrument, had a right to reserve: that part remained in Lord Gwydir, and did not vest in this person, to be sold back at any extravagant price he chose. He says, 'Having bought the whole at 12*l.* an acre, I offer to sell you these eighteen acres at 40*l.* an acre.' He desires a valuation to be made, and a valuation is made under the order of the Court. In two or

three years the trees could not have much improved, at least not to the extent of the difference between 12*l.* and 40*l.*; but the trees are valued, which he had bought at 12*l.* an acre, at 376*l.*, which is above 20*l.* an acre; this gentleman is not content with that, but he is desirous of squeezing something more out of Lord Gwydir, with whom he had made a most advantageous bargain.

I submit to your Lordships, that this appeal ought to be dismissed, with 100*l.* costs.

Judgment affirmed, with 100*l.* costs.

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## SCOTLAND.

(COURT OF SESSION.)

CARNEGIE - - - - - *Appellant;*  
SCOTT - - - - - *Respondent.*

Where a lessee of lands is in possession under the judgment of a court of law in Scotland, which judgment, upon appeal to the House of Lords, was held to be erroneous, the possession is *bond fide*; and the lessee, by the law of Scotland, is not accountable to the owner for the profits of the lands during the possession.

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THE *Lord Chancellor*.\* — With respect to the first question, I never saw a case more clear from doubt than the construction of this instrument. By making ‘heir’ a word of purchase, — for that is what is really done here, — they give a sort of entire vested right in the person who answers to the description of heir; whereas, after all, she was only one of the coparceners; she did not answer that description: but even if she had, the House of Lords in reversing set up the first judgment in a very peculiar way.

This is a question of violent profits; upon that subject the law of Scotland totally differs from the law of England, where a person has been in what is called *bonâ fide* perception of the profits, and has made expenditure for the benefit of the estate. The law of Scotland, in conformity with the civil

\* Lord Brougham.

law, with some modifications, and in conformity, to a degree, with the law in the greater part of Europe, holds that the *bonâ fide* perception and consumption of the fruits which are supposed to be consumed follows the rule of *bonâ fide* possession: “*bonâ fide possessor facit fructos perceptos et consumptos suos* ;” that is, we know, a rule contrary to the English law. They also hold with the giving relief to the extent of a portion, if not the whole, as far as it can be reasonably estimated, of that which he has *bonâ fide* expended for the improvement of the subject matter. Now that being the law, and the question being *bona fides* or not, it becomes a question of fact how far there is *bona fides* entitling the party? what shall be considered the first cesser of the *bona fides*? and where begins the *mala fides*, so as to render him responsible for the violent profit? Is there any case, or any authority without a case, in which it has been held that a party in possession under a judgment of the Court below (appealed from, it is true, but still in possession until reversed by a subsequent judgment), though it may be contrary to all the principles of law, is in *malâ fide*: can any instance be shewn where there having been a possession during the subsisting judgment, which judgment was afterwards reversed on the clearest reasons of law in this house, the reversal of that judgment has been held to go, by relation, back during the period of possession to impeach the perception and consumption of profits, or where the possessor has been deprived of the benefit of his improvements (for it is the same thing while the judgment appealed from stands), so that it was to be considered *mala fides* in the possessor while

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that judgment stood? Can you shew me any one instance of a decided case, where that was the principal point in the case, or an instance of an *obiter dictum*, (standing a judgment in favour of a party, that judgment being right or wrong,) where it was held to be a *malâ fide* possession after the reversal of that judgment?\*

I shall not trouble the learned counsel for the Respondent to discharge their duty to their client, but I will shortly state to your Lordships the reasons for my judgment. Generally speaking, when I advise your Lordships to affirm a decision in appeal it is not my practice, as I have stated on several occasions, to trouble your Lordships with the reasons which may be given, but there is a peculiarity in this case which leads me to state why I do not call on the learned counsel for the Respondents to address your Lordships. It is not from mere deference to the authority of the Court below, though that is always entitled to great respect, nor is it from any wish hastily to dispose of this matter, that I stop the counsel and decide the point in this stage of the cause; but my reason is this:—We are here on a question of Scotch law, as to which there is nothing to assist us by way of decision in our system of jurisprudence at all. Your Lordships are aware, that after a recovery in ejectment (it is not so in real actions), a separate action was given for recovering mesne profits, and that action was only limited, in the extent to which it went back, by the statute of limitations; consequently it is every day's practice by your law,

\* These observations were addressed to the counsel for the Appellant in the course of the argument.


that as soon as a person recovers possession of the land, that is to say, as soon as he shews that he, and not the person in possession before, is entitled to hold that property, he recovers all the rents and profits from the tenant as far back as the statute of limitations allows him to go in quest of his right. No question was ever allowed to be raised as to the footing on which that possession had been holden. No doubt was ever allowed to be expressed by Courts as to the clear right of the landlord who had been kept out of the possession all the while, whether, by the tenant holding on a lease which was void, or by a person holding over a lease which was bad from the defective execution of a power, or by a person holding land to which he had no title, from being in point of fact not the real heir, — whether the flaw in his title, and whereupon he had assumed to hold the land during those six years, had been from matter of fact or from matter of law, it signified not which, and whether or not he had been holding in circumstances which ought to have taught him to know he was not holding upon a right title, or whether he had been holding in circumstances which rendered it doubtful whether he had a right title, even if the law had been supposed otherwise by all the lawyers in Westminster Hall, — a thing which was of daily occurrence in the law of freehold property. If the opinions of all the judges of all the courts, and the opinions of all the conveyancers, and the opinions of all the text writers, the construction adopted by the law common or statute, — if all that weight of authority had been departed from, and the former cases overruled by an ultimate decision; if that ultimate decision was such as to entitle the

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lessor of the plaintiff to recover (and I cannot put a stronger case than the case of a *bonâ fide* possession) during all those six years the tenant would be held liable to pay back to the lessor of the plaintiff, who is now possessed of his right of possession under his judgment in ejectment, all the mesne profits, that is to say, the profits which he had been in the perception of during those six years. This is the law of England, and it is so far peculiar. The law of Scotland, following the more general principle of the law adopted, generally speaking, from the civil law, has taken in and sanctioned the doctrine that the tenant, or the person in possession, who has been possessed for a course of years under circumstances which entitled him to say he had a right to suppose he was the rightful possessor, when he is, in *bonâ fide*, only three years *facit fructos perceptos et consumptos suos* ; and that law also gives him compensation for monies he may have laid out in the *bonâ fide* improvement of the freehold ; which is also equally contrary to our law. How much contrary both of those matters are to our law I have already stated to your Lordships. To illustrate the principle of these two systems of jurisprudence, I have only further to add (it is in the knowledge of your Lordships) that one of your Lordships, a noble and learned friend of mine, the late Chief Justice of the Common Pleas, has now before your Lordships' house a bill, one of whose objects undoubtedly is to introduce a great change into our law, by importing principles from the Scotch law, which will have the effect of changing the law on this question, as far as regards the *bonâ fide* improvement of the property. This being the case, I come to a question

of purely Scotch law, upon which, in guiding your Lordships to a safe conclusion, your Lordships have no assistance whatever from the known principles, and the undoubted decisions, of your own Courts; because they proceed not only upon a different, but upon a perfectly opposite principle. Here there arises a Scotch law question with respect to a matter peculiarly of Scotch law; and when I find that there is no case whatever decided in the Scotch courts, that there is not any *obiter dictum* of judges, where this might not have been the principal point in the case, but that it rests entirely upon the reasoning and argument, somewhat partaking of refinement, of the learned person \* who took an opposite view to that of the Judges in the court below, I feel myself incapable of advising your Lordships to reverse the decision which has been pronounced in this case. I have considered the principles upon which that decision rests, and they are in conformity to the principles of all the formerly decided cases. The question is shortly this: — A person received a lease for two nineteen years from Mr. Carnegy, and the life of the heir or assignee of the lessee, and the question arose, Whether, those two nineteen years being expired, his daughter, who was not his heir (for that was justly contended by Sir Charles Wetherell in his able argument), but who was one of several coparceners, and therefore did not answer that description, should hold over. Suppose she had been an only daughter, in which case she clearly would have been the heir; it is quite clear that the tenant might have assigned the lease, and then,

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besides the two nineteen years, the assignee would have taken for her life : but there being no assignment in this case, the question is, Whether the daughter can say ‘I am the heir, I have a right to come in as a purchaser ; I am so designated and described that I take *nominatim*, as it were, as a purchaser, and come in for my life : not only had my father a right to hold over, but I have, because I am his heir.’ In the court below, the sheriff in the first place decided against the tenant ; the Lord Ordinary decided in favour of the sheriff’s interlocutor ; and it was taken to the Court of Session, and they decided against the sheriff, reversing his interlocutor, and reversing the interlocutor of the Lord Ordinary. This was in 1817, and there was an appeal by the losing party ; and that appeal being prosecuted, the judgment was reversed by your Lordships’ House by a very remarkable judgment conceived in extraordinary terms ; with a brevity, and a conciseness, and peremptoriness, which being unusual in that most learned person\* who moved the judgment (who was a most experienced judge), certainly shews what his opinion was, and that he thought it was one of the most extraordinary cases that ever came before the House. Nevertheless, the lawyers so held, your Lordships so held, the Court of Session now will probably so hold, and in future cases regulate their decisions by so holding. But the question is, whether Miss Scott was bound to anticipate this, and to discover that the Court of Session was wrong, and that your Lordships would set them right. Can I say, that a five years’ possession from 1817 to 1822, during

\* Lord Eldon.

all which time she was in possession of a judgment in her favour, shewing not only that she was in *bonâ fide*, but that she was right in point of law, and entitled to hold on, does not protect her? Could I advise your Lordships that there was a call upon her to say, ‘It is true they have decided in my favour, but I knew they were wrong in their views of the Scotch law, and could not construe the instrument according to its plain intent, and therefore I will abandon the judgment in my favour, and pack up my goods, and remove from the farm?’ They say she was in *malâ fide* during all that time, but they must be prepared to shew that. But then (and that is the most effective mode of putting the question), it is argued by Sir Charles Wetherell and Mr. Wilson, that this is not the common case of a deed sought to be reduced; they say there is this distinction, that if there was an entail, and the question was, whether a lease was granted under fetters of entail in contravention of those fetters, which was the case of Eliot and Pott, or if there was a lease sought to be reduced on the ground of force, or fraud, or concussion, which is a head of force in the Scotch law, so as to shew that that lease ought not to stand, but ought to be set aside—in those cases, they say, the question will arise of *bonâ fide* possession; and while they admit that they have no instance of a person being held accountable for violent profits because he is in *malâ fide* possession, there standing a judgment in his favour, — though they admit there are no such instances, they put it to the other side and say, ‘Do you produce a case in all respects like the present, where the tenants have been held to be in *bonâ fide* possession with or without a judgment — where

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there is no reduction of any deed,' but a case resembling the present, which arises on the construction (as I understand them) imposed upon the deed, and not the destruction of the deed by a reduction.

I cannot see that there is any solid ground for this distinction because the title of the party is the lease: the lease may be bad on various grounds; it is bad if it is granted in the non-execution of a power; it is bad if it is granted in contravention of the fetters of a good entail; it is bad if it is granted by a person *non habens potestatem* to grant; it is bad if it is extorted by force, or obtained through fraud; or if it is granted by a married woman without the consent of her husband, or by an infant without the consent of the guardian, in which case it is reduceable as against the infant. There are all these various heads of reduction; but there is also another head on which the lease is not valid, to convey the interest sought to be established by it, and that is, that the construction of the lease itself, in point of law, does not give the right contended for to the lessee. I do not see, upon principle, any distinction whatever between those various sources of invalidity in the title of the lessee; all that is different in this case is the ground upon which the title shall be held invalid. The invalidity of the title of the lessee is the only question: he has no valid title, whether that flaw in his title arises from the entail being contravened, under which the lessor made the lease; or whether it arises from force or fraud impressed or imposed upon him when he granted the lease; or whether it is bad from the words of the lease never having conveyed an estate to the

lessee for years. In all those cases, the invalidity of the lease is the material point; and that being once established, the only question that remains is, whether he was in *bonâ fide* or *mala fide* during the period of possession. Such being the grounds on which I have put this question; and having repeatedly asked for a case in which there ever has been a decision, or even an *obiter dictum* of the Court to the contrary, can I move the House to reverse the judgment? I observe, also, that Lord Pitmilley first of all pronounced an interlocutor as Lord Ordinary, by which he found violent profits due, which interlocutor your Lordships set up: yet with all that leaning in favour of the original decision, and holding it to be a clear case, as he had a right to do at all times, and still more after the decision affirming his interlocutor, Lord Pitmilley afterwards, as a Scotch lawyer, when he came to re-consider the question of violent profits, and discussed the question with his brothers, gave it in favour of the lessee, notwithstanding his own interlocutor.

I therefore cannot, on these grounds, recommend to your Lordships to do that which would be for the first time introducing into the law of Scotland a principle, not only never before acknowledged in that system of jurisprudence, but which is negatived by repeated decisions, between the principles of which decisions and the present I can discover no distinction. In this case the House would certainly not be disposed to give any costs.

Interlocutors affirmed.

1830.

  
CARNEGIE  
v.  
SCOTT.



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# **I N D E X.**

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**ACCUMULATION.** *See* EXECUTORY DEVISE.  
**ADVOWSON, APPENDENT.** *See* PREBENDARY.  
**AGREEMENT.** *See* EQUITY. PARTNERSHIP.  
**AMENDED BILL.** *See* PRACTICE.  
**ANSWER TO CROSS BILL.** *See* PRACTICE.  
**BOND.** *See* EQUITY.  
**CHURCH.** *See* PREBENDARY.  
**CLERGY.** *See* PREBENDARY.  
**CONSIDERATION.** *See* EQUITY.  
**CONSTRUCTION.** *See* AGREEMENT.  
**DEVISE.** *See* EXECUTORY DEVISE.  
**ELECTION.**

A party claiming under an instrument raising, as he contends, a case of election in equity against a party in possession under a legal right, must make out a clear and satisfactory case, to entitle him to displace the legal right.

Where under the will of a son giving benefits to his father, but of doubtful construction, there was no evidence that the father understood that a case of election was raised by the will, or that, in fact, he elected to take under it, and to give up estates disposed of by the will to which he was entitled under a marriage settlement ; and where it was in evidence that the father did acts in opposition to the will of the son, and where, by his own will, he so disposed of the estates that his daughters might either claim life estates under that will, or estates in fee under the will of the son ; and it was in evidence that by letters they declared, and executed deeds reciting that they took as tenants for life under the will of their father ; and, especially, where the equity, if any, arose forty-three years before the suit, and the daughters had then the opportunity to call on the father to elect, and failed to do so : Held, that it was doubtful whether a case of election existed, and that a party claiming under the daughters as heir could not assert such right after such lapse of time in a court of equity.

Where possession is referable to either of two inconsistent rights, the acts of a party bound to elect in order to constitute election, must imply a knowledge of the rights and an intention to elect.—*Dillon v. Parker* - - - Page 325

EQUITY. See LACHES.

D., upon the marriage of S., his niece, executed a bond with a penalty to N. and G. The condition of the bond recited the intended marriage, and that, in consideration thereof, and of natural love and affection to his niece, he had agreed to make some provision for her, and the issue of the marriage; and that “in case S., or any issue of the marriage, should survive D., or he should die unmarried, that he, his heirs, &c., should pay to N. and G., their executors, &c., 2000*l.* &c.: but if D. should die, leaving a wife or issue living, &c., then the sum of 1000*l.* &c. upon trust to lay out the 2000*l.* or 1000*l.* &c., in public or government securities, upon trust, for the separate use of S. for life, and at her decease for the issue of the marriage living, &c. &c.; and also if S., or any issue of the marriage, should be living at the death of D., he being unmarried and without issue, that, exclusive of the before-mentioned provision, he should either by his last will and testament give and bequeath, or by some ways and means give or leave unto or in trust for S., or the issue of the marriage, so much in money or valuable effects as he should by such will give or bequeath to any one of his next of kin or nearest relations, or any other person or persons; or if he should make no such bequest, &c., or if such bequest should fall short of the greatest bequest in such will to any of his next of kin, &c., then if the executors, &c., of D. should pay to N. and G., &c., or make good any deficiency that the same should fall short of, &c., in trust for S., and the issue, &c., in manner as before mentioned respecting the 2000*l.* or 1000*l.* &c., then the obligation to be void, otherwise to remain in force.”

The marriage took effect, and there were issue who attained twenty-one. S. and her husband died in the lifetime of D., who, after the date of the bond, had a natural daughter, S. B., who intermarried with D. B. the nephew of D. In April, 1804, D. employed solicitors to state cases, and took opinions as to the mode in which he might dispose of his property, so as not to be affected by the provisions of the bond.

In May, 1804, D. conveyed freehold lands, &c., at H., &c., in trust for himself for life, remainder in trust for S. B. for her separate use, remainder to D. B. for life, remainder to such uses as the survivor should appoint, remainder in default of appointment to his own right heirs. By another indenture of the same date, D. conveyed estates at C., &c., in trust for himself for life, with contingent remainders successively to two of the sons of D. B., remainder to D. B. in fee. In 1814, he executed two other conveyances, in both of which, reserving estates to himself for life, he limited remainders in the lands conveyed in trust for the sons, with the ultimate remainders in fee to D. B. All these lands were purchased by D. after the date of the bond, by application, and proportionate diminution of his personal estate, and the conveyances were made without consideration.

In 1811, D. assigned to D. B. a bond for 16,000*l*. The assignment was made without consideration, and D. continued to receive the interest for life under the security of a bond from D. B. In 1817, he assigned a mortgage for 2000*l*. in trust for himself for life, and, at his death, for the benefit of S. B. In February 1817, he transferred 20,000*l*. navy 5 per cents., and 35,000*l*. 3 per cent. consols, to D. B. and S. B., his wife, under an agreement, or with the understanding, that he was to receive the dividends upon the stock transferred during his life. By his will, dated in 1814, D., after giving to the children of S. an option to take 6000*l*. in satisfaction of the bond, and various legacies to D. B. and other persons, devised and bequeathed all the residue of his estate and effects to D. B. D. died in March 1817.

Held, that the condition of the bond was to be construed in equity as an agreement made upon consideration of marriage, which might extend beyond the penalty; that the gifts of the lands purchased by D., with personal estate after the date of the bond, and conveyed to D. B. in reversion, subject to a life interest reserved to D., and also the gifts of the bond for 16,000*l*., and all other beneficial interests given to D. B., were to be considered as testamentary within the terms of the agreement; and that as to the gifts of the stock of 20,000*l*. and 35,000*l*. to D. B. and S. B., his wife, and other partial or contingent interests, the value of the interest of D. B. in such funds was to be estimated as

they stood at the death of D., with a view to ascertain what amount of benefit D. B. took under the will and testamentary gifts of D., in order to estimate the proportion to which the parties claiming under the bond were entitled ; and that, assuming D. B. to take the largest legacy or interest under the will or gifts held to be testamentary, that the parties claiming under the bond should receive out of the residue given by the will of D. a sum equal to such legacy or gifts ; and if the residue should be insufficient, then that the legacies and gifts to D. B. and S. B. should abate in proportion, so as to effect such equality ; and after such application of the general residue, if sufficient, &c. that the clear residue should be divided between D. and the parties claiming under the bond. — *Logan v. Wienholt* - - - - - Page 1

**EVIDENCE.** See **ELECTION.** **LACHES.** **PLEADING.** **NEW TRIAL.**

**EXCHANGE.** See **REMITTANCE.**

**EXECUTION.** See **PLEADING.**

**EXECUTORY DEVISE.**

A will devising land, &c. to trustees upon trusts for accumulation during twenty-one years, without reference to the minority of any described person or any of the purposes of marriage, and also creating a term in the trustees for 120 years, if twenty-eight persons named, or any or either of them, should so long live, many of the persons named being unconnected with, and taking no benefit under, the trusts, with a term in gross of twenty years, upon trust after the expiration of the terms of 120 and twenty years, determinable as before provided, that the trust estates should be conveyed by the trustees to such person as would be entitled to the same by purchase or descent, for the first or immediate estate for life, in tail or in fee, in the same trust estates as if they had by the will been devised, &c. to the use of G. B. (a nephew of the testator) for life, remainder to his sons successively in tail male, with similar remainders to other nephews and nieces, upon the like limitations, with a declaration that the person to whom the conveyances should be made should have such estates as he, &c. would be entitled to take under the limitations if they had been made by the will, with the like remainders over, &c. ; and that no person should be entitled to a vested estate, or any other than a contingent interest, until the expiration or other sooner

determination of the 120 years determinable, &c., and twenty years.

Held, that the will was valid by way of executory devise, both as to the trust for accumulation under the 39 & 40 Geo. 3.; and also as to the limitation to take effect at the expiration of the lives named, and twenty-one years absolute as a term in possession, without reference to infancy or minority. — *Cadell v. Palmer* - Page 202

**FOREIGN SOVEREIGN.** See PRACTICE.

**ISSUE.** See PARTNERSHIP. TRUST.

**LACHES.**

Under a decree for the administration of assets, N., as a creditor, made a claim upon a bond for 12,000*l.*, upon which issues were directed to be tried by the court, whether as to any and what part the bond was given for services, or as a loan, or whether it was a bond of indemnity to the extent of 10,000*l.*, or a gift. The House of Lords, on appeal, reversed the order, directing the issues, and remitted the cause to be decided upon the facts in evidence before the court below: whereupon the court declared that the bond as to 10,000*l.* was a counter-security, &c. This decree having also been reversed, upon appeal, an order was made in the court below, on the petition of parties in the cause interested in the assets, that they might be at liberty to file a bill to impeach the validity of the bond as a gift. Upon appeal against this order, it was reversed, chiefly on the ground that the parties had opportunities to raise the same question in the former proceedings, which they had neglected, and that no other or further evidence was to be expected than that which was already before the court. — *Nicol v. Vaughan* - - 395

**LANDLORD AND TENANT (Scotland).**

Corn purchased in open market may, by the law of Scotland, be recovered from the buyer to satisfy rent in arrear for the current year, the corn being part of the produce of that year of the land rented. — *Dunlop v. Dalhousie* - - - 422

**LAPSE OR LENGTH OF TIME.** See ELECTION.

**MARRIAGE CONSIDERATION.** See EQUITY.

**MESNE PROFITS (Scotland).**

Where a lessee of lands is in possession under the judgment of a court of law in Scotland, which judgment, upon appeal to the House of Lords, was held to be erroneous, the possession is *bonâ fide*: and the lessee, by the law of Scotland, is not accountable to the



person upon the appeal adjudged to be owner for the profits of the lands during the possession. — *Carnegy v. Scott* - - - Page 462

NEW ASSIGNMENT. See PLEADING.

NEW TRIAL (*Scotland*).

In a suit in the Court of Session (*Scotland*) upon a contract for the sale and purchase of a wood, in which the vendor reserved a power to retain a certain number of acres to be taken out of the belt of the wood, evidence was admitted by the court respecting the price or value of the part selected to be reserved, which evidence ought to have been rejected; and judgment in the suit was given for the vendor, the purchaser not having asked of the court to direct an issue to the Jury Court. Upon appeal against this decision, the House of Lords being of opinion that the judgment was supported by the other evidence in the cause, and ought to have been the same if the evidence improperly admitted had been rejected, and that the court was judge of the law as well as the fact, held that the judgment was right, and that an issue as to the value ought not to be directed. — *N. B.* That the same exception to the general rule as to new trials prevails in English courts of law, where, although the effect produced upon the jury by the improperly admitted evidence cannot be ascertained, the courts, in some instances, refuse to direct a new trial. — *Pentland v. Willoughby* - 453

NEXT PRESENTATION. See PREBENDARY.

NOTICE. See TRUST.

PARTNERSHIP.

By articles of partnership made in 1802, between R. and A., it was agreed that a mercantile house should be established and carried on for the sale of West India produce on commission, and the supply of stores to planters, &c.; that R. should be interested for profit and loss in three fourths; and A. in one fourth; and that the partnership should not advance money on loan to any person without the previous particular consent of all the partners.

B. was privy to this deed; and by other articles of even date it was agreed that B. should be a partner in the concern under R., and should be interested for one fourth, to be deducted out of the share of R.; and it was provided, in case of the death of A., that his share should be divided, so as to give to R. two thirds, and to B. one third of the whole business.

By a deed executed in March 1804, it was agreed that the partnership should be dissolved as to A.; and in consideration of his retiring, that R. and B. should pay for his use 2,668*l.* and 2,500*l.*, for which acceptances of the firm had been given; and that all the property of the partnership should become the absolute property of R. and B.; and accordingly the partnership property was by the deed assigned to R. and B. generally, without specification as to the proportion of their shares and interests in the property so assigned. The bills accepted by the firm as the consideration for this assignment were afterwards paid out of the funds of the continuing partnership.

By a deed executed in June 1804, to which R. and B. were parties, a debt of 94,511*l.* 1*s.* 6*d.*, secured by mortgage upon a West India estate, was purchased by and with the securities assigned to R. and B., in consideration of a sum of 69,511*l.* 1*s.* 6*d.* By another deed of even date, reciting that the purchase money was to be paid by bills which had been drawn upon the firm of R. and B. by the assignor of the mortgage, the estate was charged with the payment of the bills, and R. and B. also covenanted to provide for the bills when due.

After this purchase various deeds were executed by the mortgagor giving further interests to the firm of R. and B. in the estate upon which the mortgage money was secured, and other plantations. The consignments from these plantations were made to the firm of R. and B., and the transactions relating to the mortgage were entered in the partnership books without any remark.

In 1814, in a deed by which R., for himself and as attorney for B., granted an annuity charged upon one of the estates called H., it was recited that the plantation had vested in R., in trust for himself and B., as tenants in common in fee simple; but the bills of costs for business done in respect of the mortgage transactions were charged against the firm, were so entered in the partnership books, and were paid out of the joint funds.

R. died in 1821.

In March 1823, B. filed a bill against the personal representatives of R., stating that he and R., as partners, became mortgagees and afterwards owners of the estates before mentioned; and that as to the plantation H., it was purchased with funds supplied by him (B.) on account of the partnership; and that it was always treated as the property of the partnership. This suit was not

prosecuted ; but in May 1828 a bill against B. was filed by the representatives of R., and in 1827 a cross bill by B. raising the question as to the share of B., and it was held upon appeal, reversing the decree of the court below, that B. was not entitled to a moiety of the funds upon the mortgage transactions and the retirement of A., but to the same share and proportion as under the provisions of the original articles of partnership.—

*Robley v. Brooke* - - - Page 90

#### PARTNERSHIP (*Scotland*).

Where there is no express contract between partners it is not, according to the law of Scotland, a necessary presumption of law that the profits of both are to be divided in equal shares. But it is a question for a jury, upon evidence of all the circumstances (as goodwill, skill, capital, labour, &c.), what the proportion of each partner in the loss and profit should be. As to English law, Quære.—*Thompson v. Williamson* - 432

PENALTY IN BOND. See EQUITY.

PERPETUITY. See EXECUTORY DEVISE.

PERSONAL REPRESENTATIVE. See PREBENDARY.

#### PLEADING.

To an action of trespass, for entering a ship and seizing goods, the Defendants pleaded that H. and L. had recovered a judgment against one T., and had sued out a writ of *fi. fa.*, by virtue whereof the Defendants as sheriffs, &c., entered and took in execution the goods, being the goods of T. The Plaintiff, admitting the judgment and writ, replied, *de injuria absque residuo causæ* ; and new assigned, that the Plaintiffs, “at other times, and on other occasions, and for other purposes than in the plea mentioned, entered and seized the goods.”

Upon the trial, it appeared in evidence that the Plaintiff was sole owner of the ship ; that the goods were shipped in Van Dieman's Land for London ; that the master signed bills of lading, which stated that the goods were shipped by T., to be delivered in London to H. and L., he or they paying freight, &c. ; that the ship arrived on the 27th of June ; that a treaty had been going on between the Plaintiff and H. and L. respecting the rate of payment for the freight ; and that on the 4th of July the Defendants seized the goods, which were assigned by the sheriffs to H. and L. The Plaintiff also gave in evidence, *First*, A memorial, dated on the 4th of July, presented to the commissioners of the customs by H. and L., in which they stated that they were the im-

porters of part of the goods seized ; 2. A certificate by H. and L. to the excise office, that some oil (other part of the goods seized) had never previously been sold, and that a sale thereof by auction then intended was the first sale thereof; 3. A written authority to their broker to buy the oil at a certain price as their property. The Defendant gave in evidence the shipping of the goods by T., the charter party, the writ, &c., and the seizure of the goods by the officers, &c.

Held, that it was competent by law upon these pleadings for the Plaintiff to shew at the trial, in maintenance of his action, that the acts of the Defendant were not really done under or in execution of the writ, but for another purpose, under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods without paying the freight. — *Lucas v. Nockells* - Page 140

#### PRACTICE.

The King of Spain having filed a bill in the Court of Chancery against H. and W., charging them with the receipt of money from his agents, a demurrer was filed to the bill, on the ground that a sovereign prince could not sue in England. The demurrer having been overruled, the defendants filed a cross bill against the King of Spain seeking discovery and relief, and put in an answer to the same effect as the cross bill ; upon which it became necessary for the Plaintiff to amend his bill ; and having so amended his bill, the Defendants obtained an order for the usual time to answer the amended bill after the Plaintiff in the original bill should have answered the cross bill. Whereupon a motion, supported by affidavit, was made on behalf of the King of Spain, that he might answer the cross bill by deputy, &c., submitting that it should have the same effect in all respects as if put in upon oath, or that the answer might be taken without oath or signature.

This motion was refused by order of the court below, and the order affirmed upon appeal. — *The King of Spain v. Hullett* - - - 359

#### PREBENDARY.

An advowson belonging to a prebendary in right of his prebend became vacant, and the prebendary died without having presented a parson : Held, that the right of presentation belonged to the personal representatives of the prebendary. — *Mirehouse v. Rennell* - 241

#### PRESUMPTION. See PARTNERSHIP.

**REMITTANCE (Scotland).**

A sum composed of principal and Indian interest having been found due to A., with a direction and declaration that it should be remitted from India with interest at five *per cent.* to the time of remittance, deducting the cost of remittance and property-tax: Held, that the usual remittance of one *per cent.* should be allowed — but not one year's interest upon bills, as if drawn for the purpose of remittance according to the alleged custom in Indian transactions, especially as the rate of exchange during the period was at two shillings the rupee, and, that property-tax upon the consolidated sum should be deducted from the date of the order for payment to the time when the tax was repealed. —

*Keble v. Templer* - - - Page 410

**TRESPASS.** See **PLEADING.**

**TRUST (Scotland).**

Where trust money in the hands of a debtor was applied by a banker in payment of his debt: Held, that it was a proper case for issues to be directed to inquire how much of the money had been so applied, and whether the creditor, at the time of the appropriation, knew that it was trust money. — *Taylor v. Forbes* - - - 417

**TRUSTEE (Scotland).**

O. was appointed, with four other trustees, under a deed, which provided that every act done under the trust should be with the concurrence of at least three of the trustees. Three of the trustees advanced part of the trust fund to K., one of the parties interested, upon the security of an insurance upon his life, in which act O. refused to concur. Upon the death of K., the insurance office, before payment of the sum insured, required a discharge from the trustees, of whom three only were living, in which discharge O. refused to concur. Upon a suit in the Court of Session, it was decreed that he should execute the discharge, and concur in all lawful and necessary acts to give effect to the trust. — *Ouchterlony v. Lynedoch* - - - 448

**WILL.** See **EXECUTORY DEVISE.**

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